UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LONNIE KAUFFELD,)
Plaintiff,)
)
vs.)
) Case No. 94-C-1136B
PUBLIC DEFENDER OFFICE,)
Defendant.)

Notice of
DISMISSAL

COMES NOW, Plaintiff herein Lonnie Kauffeld and moves this Court to Dismiss his Petition filed herein with Prejudice.

Lonnie Kauffeld further shows the Court that he has entered this Dismissed voluntarily and without any duress or conercion and with advise of counsel

SIGNED this 5th day of Jan, 1995.

Lonnie Kauffeld
LONNIE KAUFFELD

CERTIFICATE OF MAILING

This is to certify that on 5th day of Jan, 1995, a true and correct copy of the above and foregoing instrument was mailed to Waldo F. Bales, Attorney, P.O. Box 1140, Jay, OK 74346, with postage thereon prepaid.

Lonnie Kauffeld
LONNIE KAUFFELD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIRST FINANCIAL INSURANCE COMPANY, an Illinois corporation,

Plaintiff,

v.

RAY PEARCE and DARIN TANKERSLEY,

Defendants.

No. 93-C-0199-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of First Financial Insurance Company and against the Defendants, Ray Pearce and Darin Tankersley, regarding Plaintiff's declaratory judgment action. The Court hereby declares that First Financial Insurance Company, by way of its liability insurance policy covering Group K Investments d/b/a Cadillac Country, is not obligated to defend the underlying state court lawsuits by the Defendants, Ray Pearce and Darin Tankersley, and is not obligated to pay any damages which either Ray Pearce and Darin Tankersley obtain in said state court lawsuits. The Court further concludes the parties are to pay their own respective costs and attorneys fees.

DATED this 9th day of January, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERNEST EUGENE HARPER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-948-B
	)	
LEROY L. YOUNG, et al.,	)	
	)	
Respondent.	)	

ORDER

In the present pro-se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Petitioner contends that his due process rights were violated when he was removed from the preparole-conditional-supervision program and transferred back to prison without a hearing. Respondent contends that habeas corpus is not the proper procedure for petitioner's claims. In the alternative, he argues that Petitioner was provided all the process that was due him. For the reasons stated below, the Court concludes that the petition for a writ of habeas corpus must be denied.

I. BACKGROUND

Following his conviction for first degree murder in the District Court of Tulsa County, Case No. CRF-75-2445, on April 7, 1976, Petitioner was sentenced to life imprisonment. On October 16, 1990, the Oklahoma Department of Corrections (DOC) placed Petitioner under the provisions of the Preparole Conditional Supervision program (PPCS), Okla. Stat. tit. 57, § 365 (1990).

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Under that program, Petitioner was allowed to live outside of the institution, hold a job, and be with his family and friends, although he remained under the close supervision of his preparole officer. On March 14, 1991, Petitioner's PPCS status was revoked without a hearing and Petitioner was returned to the custody of the DOC. The only process given Petitioner was notification that the Governor had refused to grant him parole and that he would be re-incarcerated.

In March 1992, Petitioner filed a petition for a writ of habeas corpus in the District Court for Okfuskee County, alleging that his PPCS status was improperly revoked without a hearing. He argued that he had a liberty interest in remaining on PPCS sufficient to require due process prior to revocation. The district court denied relief, finding that habeas corpus was not the proper procedure to challenge the revocation of his PPCS status. On appeal, the Court of Criminal Appeals rejected the district court's conclusion that a writ of habeas corpus was not appropriate, but concluded that Petitioner was not denied due process when he was removed from PPCS without a hearing. The Court of Criminal Appeals concluded that Pardon and Parole Board Procedure NO. 004-11, effective August 8, 1991, gave Petitioner "sufficient notice when he [was] placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole." Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Procedure No. 004-11 provides that inmates who are denied parole by the governor shall remain on PPCS,

but their cases shall be reviewed by the Parole Board ninety days from denial to determine whether that status will be continued.[1]

In the present petition, Petitioner argues that Procedure No. 004-11, effective five months after the revocation of his PPCS status, was inadequate notice in his case. He also argues that the "application of said policy to Petitioner is a retroactive law as applied to him and as such is violative of his constitutional rights as an ex post facto law."

Respondent asserts that habeas corpus is not the proper procedure for Petitioner's claim. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement, and therefore the petition should be dismissed. In the alternative, Respondent argues that Petitioner was not denied due process when he was removed from the PPCS program without a hearing because he remained in the custody of the DOC while being on PPCS. Respondent argues that the PPCS program merely changes the degree and the situs of an inmate's confinement, citing Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993).

II. DISCUSSION

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a

[1]Petitioner was not granted a ninety-day review by the Parole Board under Procedure No. 004-11 because he was re-incarcerated prior to the enactment of that Procedure.

federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

Next the Court turns to the substantive issues in this case: (1) whether Petitioner properly brought this action under the federal habeas corpus statute, and (2) whether Petitioner had a liberty interest in remaining on the PPCS program.

A. Appropriateness of this Habeas Corpus Action

As noted above, Respondent challenges the appropriateness of maintaining this action under the federal habeas corpus statute. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement. Citing Preisser v. Rodriguez, 411 U.S. 475 (1973), Respondent contends that the proper vehicle for such a challenge is

the civil rights statute. The Court disagrees.

In Preiser, 411 U.S. at 499-500, the U.S. Supreme Court "explicitly left open the possibility that a challenge to prison conditions, cognizable under § 1983, might also be brought as a habeas corpus claim." Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987). Moreover, the nature of the PPCS program shows that it is more closely related to the length, rather than simply the conditions of confinement. Therefore, the Court concludes that the revocation of PPCS may be properly challenged in a habeas corpus proceeding. See Brennan, 813 F.2d at 4-5.

B. Liberty Interest

The main issue in this case is whether Petitioner had a liberty interest, implicating due process protections, in remaining on the PPCS program. Such an interest may arise either under the Fourteenth Amendment or under state law.

1. Fourteenth Amendment

The Supreme Court has consistently held that prisoners under confinement do not have a liberty interest deriving independently from the Constitution, even in cases concerning parole and good time credits. See Hewitt v. Helms, 459 U.S. 460 (1983); Wolff v. McDonnel, 418 U.S. 1 (1979). The Court has found, however, independent liberty interests where total release from institutional life has been revoked, as in the case of a parolee, or where the restrictions imposed go beyond the original conditions

of confinement. See Morrissey v. Brewer, 408 U.S. 471 (1972) (independent constitutional due process protection in case of revocation of parole); Vitek v. Jones, 445 U.S. 480 (1980) (independent due process protection in involuntary transfer to mental hospital); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (independent constitutional due process protection in case of revocation of probation). "A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial although conditional freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Whitehorn v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985) (footnote omitted) (quoting Gagnon, 411 U.S. at 781).

An inmate on PPCS is granted a measure of liberty that lies between that of a parolee and that of an inmate incarcerated in prison. A prisoner on PPCS enjoys considerable liberty similar to a parolee. He lives outside an institution and is free to work and be with his family and friends, while remaining under the close supervision of his preparole officer. Unlike a parolee, however, a prisoner on PPCS has not yet "been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." Morrissey, 408 U.S. at 482. He is instead permitted to live in the world outside the prison walls, although still in "custody" of the DOC, prior to the granting of parole as an alternative to incarceration due to overcrowding in the prison

system.

Okla. Stat. Ann tit. 57, § 365(A) (emphasis added) states as follows:

> Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity . . . the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:
>
> (1) Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of this title, shall be eligible to participate in this program;
>
> (2) An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within twenty-one (21) months of his projected release date, prior to being eligible for this program; and
>
> (3) Only inmates who have attained the proficiency level established by Section 3 of this act . . . or who comply with education requirements as provided in subsection C of Section 4 of this act shall be eligible for participation in this program.

Pursuant to section 365, an inmate on PPCS cannot be equated to an inmate who has been granted parole--i.e. conditional release intended to permit the prisoner to demonstrate that he can function in society.[2] In fact, an inmate on the PPCS program, unlike an

[2]Nor can an inmate on PPCS be equated to a prisoner who returns to an institutional setting at night after working or studying outside the prison walls. Cf. DeTomaso v. McGinnis, 970 F.2d 211 (7th Cir. 1992); O'Bar v. Pinion, 953 F.2d 74 (4th Cir. 1991); Codd v. Brown, 949 F.2d 879 (6th Cir. 1991); Brennan v. Cunningham, 813 F.2d 1 (1st Cir. 1987); Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985); see also Beasley v. Duncil, 792 F.2d 485 (S.D.W.Va 1992), affirmed, 9 F.3d 1106 (4th Cir. 1993). In the above cases, the courts concluded that prisoners did not posses an independent liberty interest arising under the Fourteenth

inmate on parole, is required to remain eligible for parole in order to participate in the program. See section 365(A)(1). He is subject to the DOC's disciplinary proceedings should he violate any of the rules of the PPCS program. See section 365(E). He is deemed in constructive custody of the DOC for purposes of Escape from Custody of the Department of Corrections, Okla. Stat. tit. 21, § 443 (West Supp. 1995), should he not be located within twenty four hours or if he fails to report to a correctional facility or institution, as directed. See Section 365(F). Lastly, an inmate on PPCS is required to attend and progress satisfactorily in an educational program.

In Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993), the Court of Criminal Appeals concluded that because an inmate on PPCS remains in the custody of the DOC he is not entitled to the protections set out in Morrisey v. Brewer, 408 U.S. 471 (1972). The court stated as follows:

> By definition, Preparole is not the same as parole. The prefix 'pre' means 'in front,' 'before,' or 'in advance.' XII Oxford English Dictionary, at 294 (2d ed. 1989). Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. Therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since 'parole' means release form jail, prison or other confinement after actually serving part of a sentence, [Black's Law Dictionary at 1116 (6th ed. 1990)], logically preparole means before such release.
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> . . .
>
> Under this program (the PPCS program), a person in the custody of the department of corrections is placed in a specific city or town after proper notification of authorities there (Section 365(D)). An inmate on PPCS remains in the custody of

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Amendment in remaining in a work/study release program or halfway house because their situation was different from that of a parolee.

the Department of Corrections. See 57 O.S. 1991, § 365(A). Thus, only the degree of his confinement is affected by his placement on the PPCS program.

Barnett, 852 P.2d at 162-63.

In Pece v. Neuman, et al., Case No. CIV-90-44-T (W.D.Okla. Aug. 28, 1990) (unpublished opinion, attached to Respondent's Rule 5 response), the Western District of Oklahoma held that probation/parole protections of Morrissey v. Brewer do not apply to an inmate removed from PPCS status as a result of a program violation because the statute itself provides that any violation of rule or condition would subject an inmate to the disciplinary proceedings established by the Department of Corrections. Similarly in Gloria v. Miller, 658 F.Supp. 229, 232 (W.D.Okla. 1987), the Western District held that Oklahoma's house arrest program was not probation or parole and that inmates in the house arrest program, as well as the PPCS program, remain in the custody of the DOC. See 57 O.S. 1991, § 510.2.[3]

Petitioner asks this Court to reject the reasoning of the Oklahoma Court of Criminal Appeals in Barnett and to adopt the Eighth Circuit's analysis in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), because his status on PPCS was more like that of a parolee than an inmate in the custody of the DOC in that he lived outside an institution, was free to work and interact with family and friends. The Court declines to apply Edwards to the case at

[3]In Oklahoma, the house arrest program, much like the PPCS program, authorizes prisoner to be in a community away from a correctional facility for the purpose of reintegration of the person into society.

hand. Edwards involved an inmate who had been released from institutional life completely pursuant to a work/study release program which equated for all purposes to parole. The Eighth Circuit there held that the prisoner had a liberty interest in remaining on the work release program sufficient to require due process prior to revocation because she was allowed to live in the world outside prison walls just like a parolee. The court noted that while "Edwards is subject to more constraints in the 814 program than she would be if on parole, . . . we find determinative the fact that she has been released from institutional life into society. The constraints applied to Edwards serve to guide her in the outside world, not . . . to confine her to the equivalent of an institutional life." Id. at 302-03.

Because the Petitioner in the case at hand had not been released from institutional life altogether while participating on the PPCS program, he did not have a liberty interest protected by the Fourteenth Amendment in retaining his PPCS status. As noted above, the Supreme Court has inferred inherent due process protections only in cases in which the prisoner's "release from institutional life altogether" has been revoked, Hewitt v. Helms, 459 U.S. at 468; Morrisey v. Brewer, 408 U.S. 471 and Gagnon v. Scarpelli, 411 U.S. at 778; or in cases in which the restrictions imposed go beyond the original conditions of confinement, see Vitek v. Jones, 445 U.S. 480.[4] Although Petitioner was permitted to live

[4]The benefit of PPCS as a statutory aid to relieve prison overcrowding would be lost if the DOC were required to provide due process protection as set out in Morrisey v. Brewer every time a

outside an institution, work and interact with family and friends, his release from institutional life was conditioned on obtaining parole. Moreover, Petitioner's return to the general prison population did not subject him to confinement beyond the sentence initially imposed upon him. See Vitek, 445 U.S. at 480. Therefore, because the Supreme Court has steadfastly refused to expand the scope of liberty interest, the Court finds it compelling to conclude that Petitioner did not have a liberty interest protected by the Fourteenth Amendment in remaining on the PPCS program once the governor exercised his discretion to deny Petitioner's parole.

2. State Created Liberty Interest

The Court turns next to state statutes and regulations to determine if there is a liberty interest derived from state law. To establish a liberty interest deriving from state law, a prisoner must show

> 'that particularized standards or criteria guide the State's decision makers.' If the decision maker is 'not required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' . . . the State has not created a constitutionally protected liberty interest.

Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (cites omitted).

After reviewing the DOC procedures in effect at the time Petitioner was re-incarcerated, the Court concludes that the procedures do not contain any mandatory language or specific

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prisoner's PPCS status is revoked.

directives that if the inmate meets the criteria, he shall be placed in the pre-parole conditional supervision program. The procedures merely list the eligibility and placement criteria to be considered and do not contain mandatory language that Petitioner shall remain in the program even if he is not eligible for parole. Only after Petitioner's return to confinement the DOC amended the regulations to provide that inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be reviewed by the Parole Board ninety (90) days from denial to determine whether that status will be continued.

Because neither the statute nor the regulation in question at the time of the revocation of Petitioner's PPCS status created a liberty interest, Petitioner was not entitled to due process protection as set out in Morrisey v. Brewer.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner did not have a liberty interest under either the Fourteenth Amendment or State law in remaining on the PPCS program. Only the degree of his confinement was affected by his transfer from the PPCS program to an institution within the Oklahoma Department of Corrections. Accordingly, Petitioner was not entitled to the protections of Morrisey v. Brewer, 408 U.S. 471 (1972), when he was removed from the PPCS program.

The Petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 9th day of Jan., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT
JAN 9 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ELMER D. PENNINGTON,

Plaintiff,

JUDIE E. PENNINGTON,

Intervening Plaintiff,

vs.

PLANET INSURANCE CO., an insurance corporation; and GAM-BAL, INC.,

Defendants.

Case No. 93-C-876-BU

ENTERED ON DOCKET
DATE JAN 10 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 9 day of January, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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FILED
IN OPEN COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JAN 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEBORAH BALLARD,

Plaintiff,

vs.

AUTOMECHA, LTD., a Corporation, AUTOMATED MAILING SYSTEMS CORPORATION, a Corporation,

Defendants.

Case No. 94-C-660-BU

ENTERED ON DOCKET

DATE JAN 10 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 9 day of January, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PRUDENTIAL SECURITIES, INC. f/k/a PRUDENTIAL-BACHE SECURITIES, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 94-C-1108K
FRANCIS X. QUINN and MARLENE S. QUINN,	)	
Defendants.	)	

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

To the Honorable United States District Court:

The parties to this action hereby respectfully stipulate that the above-entitled action be dismissed without prejudice, with each party to bear their or its own costs an attorney's fees.

DATED this 5th day of January, 1995.

Respectfully submitted,

William B. Federman, (OBA# 2853)
DAY, EDWARDS, FEDERMAN, PROPESTER
& CHRISTENSEN, P. C.
2900 Oklahoma Tower, 210 Park Avenue
Oklahoma City, OK 73102-57605
ATORNEY FOR PLAINTIFF

Dan George, (OBA #3322)
P. O. Box 748
Sallisaw, OK 74955
(918) 775-5515
ATTORNEY FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RACHEL L. BROWN;
CITY OF SAND SPRINGS, Oklahoma;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-694-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of Jan, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CITY OF SAND SPRINGS, Oklahoma and RACHEL L. BROWN, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CITY OF SAND SPRINGS, Oklahoma, was served a copy of Summons and Complaint on July 18, 1994, by Certified Mail.

The Court further finds that the Defendant, RACHEL L. BROWN, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general

circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 13, 1994, and continuing through November 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, RACHEL L. BROWN, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, RACHEL L. BROWN. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon

this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 3, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Eight (8), Nine (9), and the North Half of Lot Ten (10), Block Five (5), OAK RIDGE ADDITION to the City of Sand Springs, in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 31, 1985, Rhonda K. Chronister, executed and delivered to First Security Mortgage Company, her mortgage note in the amount of $33,500.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11½%) per annum.

The Court further finds that as security for the payment of the above-described note, Rhonda K. Chronister, a single person, executed and delivered to First Security Mortgage Company, a mortgage dated July 31, 1985, covering the above-described property. Said mortgage was recorded on August 9, 1985, in Book 4883, Page 1371, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 25, 1986, First Security Mortgage Company, assigned the above-described

mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on December 30, 1986, in Book 4991, Page 2439, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to Triad Bank, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 6, 1989, Triad Bank, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 13, 1989, in Book 5213, Page 1706, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1988, Richard Sheldon and Rhonda K. Chronister, now Rhonda K. Sheldon, Husband and Wife, granted a general warranty deed to the Defendant, RACHEL L. BROWN. This deed was recorded with the Tulsa County Clerk on July 1, 1988, in Book 5111 at Page 907 and the Defendant, RACHEL L. BROWN, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on October 1, 1989, the Defendant, RACHEL L. BROWN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on May 1, 1991 and April 1, 1992.

The Court further finds that the Defendant, RACHEL L. BROWN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, RACHEL L. BROWN, is indebted to the Plaintiff in the principal sum of $50,642.33, plus interest at the rate of 11½ percent per annum from June 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $16.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $12.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of $12.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RACHEL L. BROWN and CITY OF SAND SPRINGS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, RACHEL L. BROWN, in the principal sum of $50,642.33, plus interest at the rate of 11½ percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 7.22 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $40.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RACHEL L. BROWN, CITY OF SAND SPRINGS, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, RACHEL L. BROWN, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District

of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $40.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-694-BU

NBK:flv

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 6 - 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EMCASCO INSURANCE COMPANY, an Iowa corporation,

Plaintiff,

vs.

LYCO MANUFACTURING, INC., a California Corporation d/b/a RIVERLANES BOWLING CENTER; KELLY R. JUNK and THOMAS M. JUNK, as individuals, and husband and wife; TAMMIE LYNNE SEELEY, an individual; THOMAS MARSHALL and ELLEN MOORE d/b/a THE SHOWPLACE CLUB,

Defendants.

Case No. 94-C-145-BU

ENTERED ON DOCKET

DATE 1-9-95

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment and the Motion for Default Judgment Against Defendant Tammie Lynne Seeley filed by Plaintiff, Emcasco Insurance Company, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Judgment be entered in favor of Plaintiff, Emcasco Insurance Company, against Defendants, Lyco Manufacturing, Inc., a California Corporation, d/b/a Riverlanes Bowling Center, Kelly R. Junk and Thomas M. Junk, as individuals, and husband and wife, Tammie Lynne Seeley, an individual, Thomas Marshall and Ellen Moore d/b/a The Showplace Club.

DATED at Tulsa, Oklahoma, this 6th day of January, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 6 - 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE REPO COMPANY, INC.,

Plaintiff,

vs.

TULSA HOME INVESTMENTS, INC., an Oklahoma Corporation; SANDRA TAYLOR, now known as SANDRA RICHARDSON and JIM FORTNER,

Defendants.

CASE NO. 94-C 945 BU

ENTERED ON DOCKET

DATE 1-9-95

JOURNAL ENTRY OF JUDGMENT

NOW ON this 6th day of January, 1995, this cause comes on to be heard before the undersigned Judge. The Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation, and Jim Fortner were served with Summons more than twenty days prior to this date and the said Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner are wholly in default. The Court finds that there is no just reason for delay, and Judgment should be entered against the said Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this Court has jurisdiction over the parties and the subject matter of this cause, that said Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner are adjudged to be in default, and the allegations contained in Plaintiff's Complaint be taken as true and confessed against the said Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff is granted Judgment against the Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner, jointly and severally on its Complaint, for the principal sum of $55,839.27, together with interest in the sum of $32,159.88 through December 15, 1994 and further interest accruing at the rate of $13.77 per diem, from December 15 ,1994, until paid and for all accrued and accruing costs, including a reasonable attorney's fee.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff should have and recover an in personam Judgment against the Defendants, Tulsa Home Investments, Inc., an Oklahoma Corporation and Jim Fortner, for its costs and a reasonable attorney's fee, to be determined by the Court following notice and hearing, as provided by Rule 54(b), and 12 O.S. §928 and §936, and the terms of the Promissory Note mentioned above.

IT IS SO ORDERED this 6 day of Jan, 1995.

FOR ALL OF WHICH LET EXECUTION AND/OR GARNISHMENT ISSUE!

s/ MICHAEL BURRAGE
U.S. DISTRICT COURT JUDGE

APPROVED FOR ENTRY:

BRUCE F. KLEIN, OBA #11389
205 N.W. 63rd, Suite 160
Oklahoma City, OK 73116
(405) 848-8842

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NELDA L. CARTER,

Plaintiff,

v.

DONNA SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No. 92-C-351-E

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended, and for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Act.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fifth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.[2] He found that claimant has severe peptic ulcer disease, but her allegations are neither credible nor supported by the documentary evidence to the extent that she alleges she is unable to engage in any substantial gainful activity, even a limited range of sedentary and light work. He concluded that she has the residual functional capacity to perform the physical exertion and nonexertional requirements of work, except for the inability to engage in the exertional requirements of medium, heavy and very heavy work; and the need to work in a work environment where there is less than average stress due to the fact that her gastrointestinal symptomatology is aggravated by stress.

The ALJ found that claimant is unable to perform her past relevant work as a licensed vocational nurse, and her residual functional capacity for the full range of sedentary and light work is reduced by the need to work in a less than average stress environment. He noted that she is currently 54 years old, which is defined as closely approaching advanced age, has a high school education with additional training and licensing as a limited vocational nurse, and has acquired work skills, which she demonstrated in past work, and which, considering her residual functional capacity, can be applied to meet the requirements of skilled or semiskilled work activities of other work and to nursing jobs outside of a hospital, including skills working in a physician's office or

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

a clinic. He concluded that although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary and light work, there are a significant number of jobs in the national economy which she could perform, such as doctor's office nurse, sedentary auditing nurse, order clerk, receptionist, and mail clerk. The ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The Secretary failed in his duty to fully develop the record for an unrepresented individual.

(2) The ALJ failed to pose a proper hypothetical question to the vocational expert.

(3) The ALJ erred in failing to find plaintiff disabled because she can not perform a full range of light or sedentary work.

(4) There is not substantial evidence to support the decision of the ALJ.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant first argues that the ALJ failed in his duty to fully develop the record for an unrepresented individual. "It is well established that a Social Security disability hearing is a nonadversarial proceeding, in which the ALJ has a basic duty of inquiry, 'to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts.'" Casias v. Secretary of Health and Human Services, 933 F.2d 799, 801 (10th Cir. 1991) (quoting Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987)) (citing Heckler v.

Campbell, 461 U.S. 458, 471 n.1 (1983)). The ALJ should inquire into the nature of the impairments, the on-going treatment and medication the claimant is receiving, and the impairment's impact on the claimant's daily routine and activities. Musgrave v. Sullivan, 966 F.2d 1371, 1375 (10th Cir. 1992)(citing Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991)). This duty to develop the record is heightened if the claimant is not represented by counsel. Id. at 1374 (citing Dixon v. Heckler, 811 F.2d at 510). "However, a claimant's pro se status does not, in and of itself, mandate a reversal." Id. (citation omitted).

At the opening of the hearing, the ALJ advised claimant of the right to have the counsel of her choice present before the hearing proceeded (TR 16). However, she waived that right and proceeded without the assistance of counsel (TR 16). Furthermore, she admitted she had retained counsel for an earlier workman's compensation claim in California, demonstrating that she knew the importance of counsel in a judicial proceeding (TR 43).

Claimant specifically claims the ALJ did not develop the record concerning stress, depression, the side effects of medication, and a heart problem. However, on the subject of stress, the ALJ began with a general question: "Did you ever see a psychiatrist or get any kind of counseling like that?" (TR 41). Claimant responded affirmatively to a single instance two years prior for job related stress (TR 41). The ALJ then asked more specific questions about her marriage, children, her move from California to Oklahoma to avoid the stress of living there, and other special stresses (TR 41-42). Later questions focused on her stress related workmen's compensation claim and her hobbies (TR 43-44). She stated that

she had hired an attorney for the workmen's compensation claim, that the claim was still pending, and that she played bingo in California but now enjoyed fishing in Oklahoma (TR 43-44).

Claimant also asserts that the ALJ should have developed evidence relating to her depression. However, there is no merit to this claim. Although an ALJ must "inquire fully into the matters at issue (20 C.F.R. § 404.927), he need not inquire into matters apparently unrelated to the claim." Garcia v. Califano, 625 F.2d 354, 356 (10th Cir. 1980). Regardless of claimant's situation concerning representation, she was responsible for raising the matter of her depression if she relied on it as a basis for the disability claim. 20 C.F.R. § 404.1512. When the ALJ questioned her with regard to visiting a psychiatrist or counselor, she did not mention anything about depression (TR 41). She did not mention or otherwise refer to depression at all during the hearing. The burden was upon her to prove her disability through medical evidence of signs, symptoms, or laboratory findings of depression supported by medically acceptable clinical and laboratory diagnostic techniques, and she did not produce any such evidence, as noted by the ALJ (TR 23).

There is also no merit to claimant's argument that the ALJ did not develop the record with respect to the side effects of her medication. During the trial, she responded to questions concerning tachycardia by explaining that her Inderal prescription dosage was increased to combat the tachycardia (TR 44). She then pointed out that she was initially prescribed Verapamil, but that it was discontinued in favor of Inderal, to eliminate the side effects caused by Verapamil (TR 44-45). The ALJ also questioned her concerning her ulcer medication. She replied that she had changed her ulcer medication from Zantac to

Tagamet and Carafate because the Zantac was ineffective (TR 40).

The claimant alleges that the ALJ chose to "ignore" evidence of her paroxysmal ventricular tachycardia (PAT) and problems with bending, stooping and dizziness. However, while she testified that she had PAT "awfully bad" and shortness of breath and that any stooping or bending caused her to "get real dizzy" (TR 39), there is no medical evidence of her claimed 1982 diagnosis of PAT (TR 213). A treadmill test on November 8, 1989 found no problems and good functional capacity (TR 142). Dr. David Baum on August 4, 1990 reported she had an apparent history of paroxysmal supraventricular tachycardia, etiology undetermined, but noted that, although she reported experiencing palpitations, there was no evidence suggesting that her palpitations were associated with hemodynamic compromise and no evidence of significant hemodynamic disturbance (TR 215-16). Examination of plaintiff's heart showed a nondisplaced PMI, S-1 and S-2 distinct with physiologic splitting, but no rub, murmur, or gallop (TR 208, 215). Dr. Baum found plaintiff's report of sensory disturbances in the left arm of unclear etiology (TR 216). Dr. R.W. Daugerty mentioned her experiences with PAT since October of 1990, but did not discuss any testing done for the condition - apparently he relied on her complaints to prescribe Inderal for the condition (TR 218).

There was substantial evidence to support the ALJ's conclusion that

> although the claimant alleges disabling tachycardia and a disabling left upper extremity impairment, she has sought private treatment for these conditions on only a single occasion. Moreover, this treatment was sought in the context of a pending Worker's Compensation [claim] . . . .
>
> . . . .
>
> In the present case, the requisite signs, symptoms and laboratory findings

> simply do not exist to support the existence either of these conditions. Despite the fact that on February 21, 1991, a physician tendered a history of the claimant's condition, indicating that the claimant has been "plagued with recurrent episodes of paroxysmal atrial tachycardia," he also failed to provide any indication that this assessment was supported by objective evidence (Exhibit 24). Finally, on October 25, 1990, the claimant's tachycardia, to the extent that it exists, was noted to be controlled by Inderal (Exhibit 18). In addition, although in a recitation of the claimant's treatment history dated December 6, 1989, it is noted a 'diagnosis of paroxysmal supraventricular tachycardia was apparently [emphasis added] made' (Exhibit 22), there is no confirmation of this in the documentary evidence. (TR 18-19).

After thoroughly reviewing the record of claimant's hearing, this court concludes that the ALJ fulfilled his duty as defined above.

The second issue raised by claimant is that the ALJ failed to properly propound a hypothetical question to the vocational expert. She contends that the ALJ excluded depression and the side effects of medication from the hypothetical question. Upon review, this court determines that the questions posed by the ALJ were sufficient and proper.

A hypothetical question posed by an ALJ to a vocational expert need not include every physiological impairment suggested by the evidence. Brown v. Bowen, 801 F.2d 361, 363 (10th Cir. 1986). For the purposes of review, the ALJ is required to set forth those physical and mental impairments in the hypothetical which are accepted as true by the ALJ. Sandy v. Bowen, 725 F.Supp. 1124, 1133 (D. Kan. 1989) (citing Baugus v. Secretary of Health and Human Services, 717 F.2d 443, 447 n.5 (8th Cir. 1983)); Sumpter v. Bowen, 703 F.Supp. 1485, 1492-93 (D. Wyo. 1989). In reaching his determination, the ALJ considered and rejected claimant's allegations of depression and medication side effects. The ALJ based the hypothetical question on evidence of record and medical opinions.

There is little evidence to support claimant's allegation of depression. She testified

to only one visit with a psychiatrist or counselor, which was for job related stress instead of depression (TR 41). In addition, the ALJ noted that the diagnosis of depression and associated neuropsychiatric symptoms was unsupported by any objective medical testing and was based on claimant's allegations alone (TR 23, 209, 216). Furthermore, she does not take any prescription medication for depression (TR 219). The ALJ properly exercised discretion in excluding depression from the hypothetical question.

Claimant also contends that the ALJ acted improperly by not including the side effects of medications in the hypothetical question. This claim is also without merit. The ALJ specifically asked the vocational expert to take into account her testimony, which included an explanation of the side effects of medication. At the hearing, she testified that her medication was switched to Inderal from Verapamil because the Verapamil made her "dizzy" and "spaced out" (TR 45). The ALJ then asked the vocational expert if she had "heard the claimant's testimony" (TR 45). The vocational expert responded affirmatively (TR 45). Furthermore, claimant failed to allege any new side effects as a result of her medication switch.

The ALJ properly posed the hypothetical question to the vocational expert in conformance with the aforementioned standards.

There is also no merit to claimant's third point of contention that she must be found disabled because she cannot perform a full range of light or sedentary work. When considering nonexertional impairments, a determination that a claimant cannot perform a full range of work at a given RFC level does not necessitate a finding of disabled. Channel v. Heckler, 747 F.2d at 579-581 (citing Grant v. Schweiker, 699 F.2d 189 (4th Cir. 1983));

Gagnon v. Secretary of Health and Human Services, 666 F.2d 662, 666 (1st Cir. 1981)).

When determining whether a claimant can perform a full range of work in a given RFC level, the ALJ must use the "grids", but under certain circumstances the ALJ must also use expert vocational testimony. Trimiar v. Sullivan, 966 F.2d 1326, 1332-33 (10th Cir. 1992)(citations omitted). The grids may be applied without expert vocational testimony if claimant's impairments are only exertional and there is an "exact fit" between claimant's age, education, work experience and residual functional capacity and these factors as listed in the grids. Channel v. Heckler, 747 F.2d at 579. However, where claimant's impairments are solely nonexertional, an ALJ must use the grids as a framework to determine the extent to which the claimant's work capability is diminished, Thompson v. Sullivan, 987 F.2d 1482, 1492 (10th Cir. 1993), and a vocational expert must testify as to whether a claimant retains the ability to perform specific jobs in the national economy. Channel, 747 F.2d at 579-581; Trimiar v. Sullivan, 966 F.2d at 1333.

This is precisely the situation that confronted the ALJ in the present case. Claimant possesses nonexertional limitations arising from gastrointestinal symptomatology which is aggravated by stress. The ALJ properly determined that the grids, which reflected a finding of not disabled for claimant's specific age, education, and work experience, were inapplicable. Therefore, the ALJ relied on expert testimony to fully ascertain whether she was disabled.

The vocational expert testified that claimant's past relevant work was medium exertional and very stressful (TR 46). Furthermore, she possessed skills that would be transferable to less stressful jobs in the sedentary and light exertional range (TR 46-47).

The sedentary exertional jobs included auditing hospital bills for either hospitals or insurance companies (TR 47). The light exertional jobs included nursing in a physician's office or clinic (TR 46). The vocational expert also testified that there were less stressful entry level jobs outside the nursing field, such as receptionist, order clerk, or mail clerk (TR 48). In addition, the vocational expert testified that tachycardia would affect employability (TR 49).

There is substantial evidence to support the ALJ's conclusion that claimant was not disabled. The objective medical evidence indicates that she has peptic ulcer disease, controllable with prescribed medications, diet, and stress avoidance. Her treating physicians did not recommend she stop work activity. Dr. Baum only reported that she was temporarily disabled until certain tests were performed and the results obtained, after which he would make final recommendations (TR 209, 217). She reported that her daily activities consist of cooking twice a day, cleaning the house, doing laundry three times a week, shopping twice a week, and driving (TR 39-40). She goes to church, fishes, and plays bingo (TR 39-40).

The Secretary's decision that claimant was not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. The Secretary's decision is affirmed.

Dated this 5th day of January, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GERALD L. RUPE,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-612-K

O R D E R

This is an action brought by Plaintiff under 42 U.S.C. §405(g). Gerald L. Rupe appeals the November 16, 1992 decision of the Secretary, denying disability benefits under the Social Security Act. The issue is whether the findings of the Administrative Law Judge ("ALJ") are supported by substantial evidence and whether the correct legal standards were applied when making the decision.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920. If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

I. PROCEDURAL HISTORY

Mr. Rupe filed an application for benefits on December 1, 1989, with an alleged onset date of February 20, 1987. In a decision dated February 21, 1991, the ALJ denied the claim. Upon appeal and reconsideration on January 13, 1992, the Appeals Council vacated and remanded the claim for further consideration. A supplemental hearing was held September 2, 1992 in which the ALJ again denied disability benefits by decision dated November 16, 1992. Plaintiff's request for review of the ALJ's decision, filed January 14, 1993, was denied by the Appeals Council on May 11, 1993, making the decision of the ALJ the final decision of the Secretary. (Tr. 8, 11).

According to the Record, several other applications for total disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §401, et seq., and for supplemental security income benefits under Title XVI of the Act, have been filed by Mr. Rupe, all of which remain closed and are final. The most recent denial of benefits, before the current application, was February 19, 1988. (Tr. 11, 16-17). Thus, Plaintiff has the burden of proving that

his condition has become worse since February 19, 1988. (Tr. 17).

II. BACKGROUND

Plaintiff was born June 27, 1938, is married to Bonnie Joyce Rupe and has four grown children. He is right-handed, completed the 8th grade, received his General Equivalency Diploma (GED) in 1986, and has completed a vocational trucking school course. His past relevant work included pipe fitter, welder, long haul trucker, and owner/operator of a food concession stand. (Tr. 30-33, 34, 40, 310, 322).

In August 1979, the Plaintiff suffered an on-the-job injury which ultimately resulted in an intracervical diskectomy and fusion at the C5-6 level during September 1980. He eventually improved and was able to return to his welding job. (Tr. 299-304). In 1985 Mr. Rupe was involved in a motor vehicle accident which re-injured his neck and shoulder, at which time he was unable to continue welding. (Tr. 88, 310). For approximately 6 months, claimant and his wife attempted to haul freight for different trucking companies. However, because of the loading and unloading required, and his constant neck and leg pain, claimant had to quit. (Tr. 33, 88).

Sometime in late 1988, claimant and his wife began a funnel cake truck business, traveling to fairs and other similar events in Oklahoma, Texas, Louisiana and Florida. (Tr. 40-41). Claimant makes the phone calls to schedule the events and obtain the permits. (Tr. 34, 55). He drives the truck, (Tr. 36, 46, 95);

sets up the concession trailer and places the skirting around it, (Tr. 79, 106); connects the electrical and water lines to the trailer, (Tr. 99, 106); and does the same thing to tear down the trailer when the event is over, (Tr. 106). Because of his neck and shoulder pain, it may take him half a day to complete these tasks. (Tr. 34, 56, 99, 100, 106). Occasionally he may work an hour in the trailer, making the funnel cakes or corn dogs, but usually his wife handles the cooking and making change since he is short-tempered with the customers and often makes incorrect change. (Tr. 34, 56, 63, 107). He cannot lift more than 5-10 pounds without hurting, and has dropped things "once or twice a day." (Tr. 49). He must take a break every 30 minutes or so. (Tr. 34, 45-46, 59, 108, 111). On occasion he will hire "local people" to work with his wife in the trailer. (Tr. 41). An average day running the concession trailer requires about 9 hours, of which claimant would work 2 to 4 hours but never without taking breaks. (Tr. 55, 61, 82). Income from the concession business varies from month to month, but a "good month will net $500" as opposed to "$200 during a bad month." (Tr. 62, 80).

Mrs. Rupe testified her husband is unable to work the window or cook for very long, "leans" on her for support when walking, and is depressed "everyday." (Tr. 62-63). She felt his condition was worse now, having first started with complaints of pain in his neck, but now with complaints of pain in his hand, right leg and foot. (Tr. 63, 87). Mrs. Rupe also confirmed she "keeps the books" for the concession business. Net income for 1991 was $7,944

and $2,866 for the first five months of 1992. (Tr. 62, 80, 95, 104-105). Income tax returns confirmed income in excess of $6,500 for the year 1990 and in excess of $6,000 for the year 1991. (Tr. 338-343, 389-391).

Plaintiff complained of constant neck pain, shooting up the sides of his neck, headaches and right leg numbness, which is relieved somewhat by resting and taking Advil or Tylenol, two or three times a day. (Tr. 33, 36, 57, 91, 102). He does not sleep well, maybe 3 to 4 hours a night, has to use two pillows and still takes only "catnaps." (Tr. 42, 45, 52, 57, 93, 110, 112). He has hypertension but the medication "brings it down", although he has been unable to take it on a regular basis since he cannot afford to buy it. (Tr. 34, 101). He hurts all the time and must keep moving to relieve the pain. Cold and humidity bother him. (Tr. 42, 45, 50, 57). Daily activities include very little:

> Like this morning I got up about 4:30, took an Advil, went outside, smoked cigarettes, go lay down, go outside and come back, sit back down, go eat breakfast, go back and sit down again. (Tr. 39)

He smokes about 3 packs a day. He may read the newspaper and watch TV some. (Tr. 39, 54). On a weekly basis, claimant may drive 20 to 40 miles unless a particular event is scheduled. (Tr. 32, 75). When he drives, claimant uses the steering wheel as a brace and props his foot to help relieve the pain. (Tr. 46-47, 59). He is unable to climb, stoop, crawl, bend or kneel. He must avoid sudden movement and is careful about reaching. He is unable to wash dishes or run the vacuum, does not go shopping, and is unable to play with the grandchildren, (Tr. 47, 49, 50-51, 99, 111).

Although he has a problem concentrating because of the constant pain, claimant has no problem thinking or understanding. (Tr. 49, 54, 60, 113). Hobbies included fishing, hunting and raising horses but he has not been able to do any of these activities. (Tr. 52).

Plaintiff testified he has been treated by Dr. Benner for his neck and Dr. Battles for his blood pressure. However, he has not seen a doctor in about two years because of lack of funds. (Tr. 38, 42-44, 102).

III. SECRETARY'S DECISION

The Administrative Law Judge made the following findings:

1. The claimant met the disability insured status requirements of the Act on February 20, 1987, the date that the claimant stated he became unable to work, and continues to meet them through June 30, 1992.

2. The claimant is working as an owner/operator of a food concession stand that travels to various fairs and festivals throughout the region and nation, and has been all times relevant to this decision, and is earning an average of $300.00 to $500.00 per month (20 CFR 404.1574 and 416.974).

3. The claimant's work activity involves performing significant physical or mental activities for pay or profit (20 CFR 404.1573 and 416.973).

4. The claimant's work activity constitutes substantial gainful activity within the meaning of the regulations (20 CFR 404.1572 and 416.972).

5. The claimant has not been unable to engage in substantial gainful activity for any continuous period of at least 12 months.

6. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(b) and 416.920(b)).

(Tr. 17-18).

The scope of review is limited to the findings as listed above, basically: Is plaintiff engaging in substantial gainful activity as co-owner/operator of the food concession stand? The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The claimant bears the burden of establishing a disability, i.e., the first four steps of the five-step process detailed above. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work

types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990). In the case at bar, the review ended at step one.

The term "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A). If plaintiff actually engaged in substantial gainful activity, he could not be found disabled, regardless of the severity of his impairments. 20 CFR §414.1520(b). See Fowler v. Bowen, 876 F.2d 1451, 1453 (10th Cir.1989). Substantial gainful activity is defined as:

> [W]ork activity that is both substantial and gainful....Substantial work activity is work activity that involves doing significant physical or mental activities. . . Gainful work activity is work activity that you do for pay or profit. 20 CFR §404.1572(a),(b)

The Tenth Circuit has also elaborated on the meaning of substantial gainful activity. Substantial gainful activity, for purposes of determining eligibility for disability insurance benefits, means performance of substantial services with reasonable regularity, either in competitive or self-employment. Markham v. Califano, 601 F.2d 533, 534 (10th Cir. 1979).

Additional considerations apply in evaluating whether a self-employed person is engaged in substantial gainful activity. Fowler, 876 F.2d at 1453. Under 20 CFR. §404.1575(a), it will be determined that you have engaged in substantial gainful activity

if---

(1) Your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood;

(2) Your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in §404.1574(b)(2)[1] when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing; or

(3) You render services that are significant to the operation of the business and receive a substantial income from that business.

The three provisions are stated in the disjunctive. Therefore, if Mr. Rupe qualifies in any one of the three test areas, he will be considered to be engaged in substantial gainful activity and not entitled to disability benefits. Although not perfectly clear, it appears the ALJ focused upon 404.1575(a)(2) in concluding the plaintiff engaged in substantial gainful activity.[2]

Claimant testified that he worked a total of 2-4 hours during the approximate 9-hour day involved running the concession trailer. A concession event would last 2-5 days. Claimant drives the concession trailer. He sets up the trailer, placing the skirting around it. He connects the electrical and water lines to the trailer and also "tears down" the trailer when the event is over.

---

[1]For the relevant time frame, claimant's earnings must average more than $300 a month in calendar years after 1979 and before 1990; and his earnings must average more than $500 a month in calendar years after 1989.

[2]The ALJ did not refer to any evidence regarding the work activity of unimpaired individuals in the community, as described in (a)(1); the definitions of (b) and (c), which are necessary to an understanding of (a)(3), are also not mentioned.

Claimant makes calls to arrange the schedule and obtain the necessary permits. He assists in selling the food, purchasing the supplies, and stocking the trailer. Both claimant and his wife confirmed he is unable to work for more than 30 minutes at a time without resting, is short-tempered with the customers and often makes mistakes when making change. Nevertheless, if claimant were not performing these tasks, someone else would have to be hired to do them. At page 5 of plaintiff's brief, he asserts "[a]veraging the adjusted gross income of Plaintiff for the years 1987 to 1991 . . . yields an average gross monthly income of $185.67 for the pertinent period of time." The Court's calculation, to the contrary, indicates an average gross monthly income of $312.27 for the plaintiff. While it is true the amount of income appropriated to Mr. Rupe individually for 1990 and 1991 falls slightly below $300.00 per month, income alone is not a determining factor. In fact, a self-employed claimant's work activity and its value to the business is evaluated "regardless of whether you receive an immediate income for your services." §404.1575(a). Mr. Rupe confirmed he is self-employed in his statement dated February 18, 1992:

> I am self-employed with a food concession trailer. I book in the fairs or festivals or special events at different towns. My wife works the trailer mostly, and I help when I can. I set up the food trailer which includes leveling, and making sure we have water and electric [sic] and etc. ...

(Tr. 324). It seems clear, as defendant states in her brief, "there

would not be concession stand business at all if plaintiff did not perform these services." (Defendant's Brief at 3). Consequently, the Record is sufficient to support the ALJ's conclusion that the plaintiff's work activity, considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work plaintiff is doing, satisfies 404.1575(a)(2).

IV. CONCLUSION

In determining whether the Secretary of the Department of Health and Human Services properly denied the application for disability income benefits, the district court's function on review is not to try the case *de novo* or to supplant the findings of the administrative law judge with the Court's own assessment of the evidence. Even though Plaintiff has raised other issues, only those contained in the findings of the ALJ are properly before this Court. Therefore, this Court determines there is substantial evidence to support the ALJ's findings that Mr. Rupe's work activity constitutes substantial gainful activity, and claimant is accordingly "not disabled." The ALJ has properly applied the correct legal standards, and the decision of the Secretary is, therefore, AFFIRMED.

SO ORDERED THIS 4th DAY OF JANUARY, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERYL D. BOLT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 94-C-626-B**
	)	
ROCKWELL INTERNATIONAL CORPORATION,	)	ENTERED ON DOCKET
	)	DATE 1-5-95
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Motion by the parties, this Court hereby dismisses the captioned action with prejudice.

IT IS SO ORDERED.

DATED this 4th day of Jan., 1995.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALMO MUSIC CORPORATION, SWAG SONG MUSIC, INC., TESTATYME MUSIC, BADCO MUSIC, INC., CONTROVERSY MUSIC, and GUNS N' ROSES MUSIC,	)	
Plaintiffs,	)	No. 94-C-852-B
v.	)	
HARD TIMES, INC., JOHN D. LEGGE, and DANNY R. LEGGE,	)	
Defendants.	)	

JUDGMENT

This matter comes before the Court pursuant to plaintiffs' Application for Entry of Judgment by Default against defendants, Hard Times, Inc., John D. Legge, and Danny R. Legge. The files and records in this case reveal that the Complaint was filed on September 7, 1994; the summons and Complaint were duly served upon defendants John D. Legge, and Danny R. Legge, individually, and as the Registered Service Agent for Hard Times, Inc., as shown by the returns of service now on file in the office of the Clerk; no answer or other responsive pleading or appearance has ever been filed by defendants; the time for filing an Answer has elapsed and has not been further extended; and that none of the defendants are infants or incompetent persons. The Court therefore finds the plaintiffs are entitled to judgment by default against the defendants as requested.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Judgment is hereby rendered in favor of plaintiffs, Almo Music Corporation, et al., and against defendants, Hard Times, Inc., John D. Legge, and Danny R. Legge, jointly and severally; and

2. Defendants and all persons, companies, and corporations acting under their direction, control, permission or license, are hereby permanently enjoined from publicly performing any and all of the plaintiffs' copyrighted musical compositions and all such copyrighted music in the repertory of the American Society of Composers, Authors and Publishers ("ASCAP") and from causing or permitting these compositions to be publicly performed in the defendants' premises or in any place owned, controlled or conducted by defendants, and from aiding or abetting the public performance of any such compositions from any locations; and

3. The defendants shall pay to plaintiffs damages of $1,000.00 for each of the five (5) causes of action, and for investigation costs in the sum of $1,186.09, for a total principal judgment of $6,186.09; and

4. Pursuant to 17 U.S.C. § 505, the Court further finds that plaintiffs are entitled to recover their costs, including a reasonable attorney fee, in addition to those amounts set forth above. Plaintiffs' counsel are directed to submit a Bill of Costs and an Application for Attorney's Fee within ten (10) days after entry of this judgment in compliance with the applicable Local Court Rules.

IT IS SO ORDERED this 4th day of Jan., 1994.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMES F. QUINLAN,

Plaintiff,

vs.

KOCH OIL COMPANY, a division of Koch Industries, Inc.,

Defendant.

Case No. 90-C-295 B

ORDER FOR DISMISSAL

NOW on this 2nd day of January, 1995, the above captioned matter comes on for hearing on the Joint Stipulation Of Dismissal of the parties. The Court finds that the parties have agreed to a Stipulation of Dismissal of this matter with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Amended Complaint and all causes of action related thereto should be and are hereby dismissed with prejudice and that each party is to bear his or its own costs, expenses and fees in this matter.

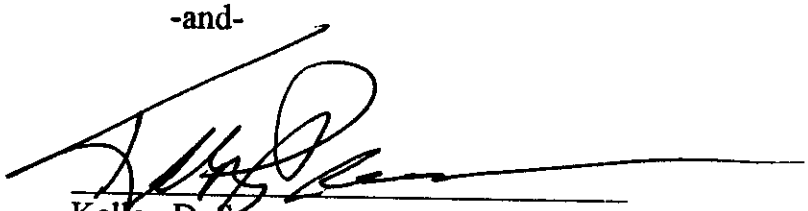
THOMAS A. BRETT
JUDGE OF THE U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approved By:

Sam T. Allen, IV
LOEFFLER, ALLEN & HAM
Loeffler-Allen Building
P.O. Box 230
Sapulpa, Oklahoma 74067
(918)224-5302

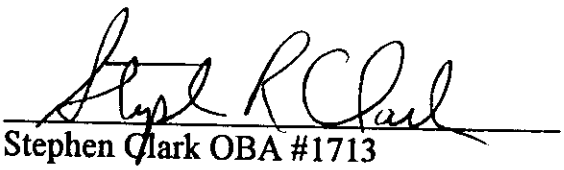
ATTORNEY FOR PLAINTIFF

-and-



Kelley D. Sears
KOCH INDUSTRIES, INC.
P.O. Box 2256
Wichita, Kansas 67201
(316) 832-8941

- and -



Stephen Clark OBA #1713
McCORMICK, ANDREW & CLARK
Suite 100
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

ATTORNEYS FOR DEFENDANT
KOCH OIL COMPANY, a Division of
KOCH INDUSTRIES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NOVUS CREDIT SERVICES, INC., a Delaware Corporation,

Plaintiff,

vs.

MITCHELL MOTOR COACH SALES, INC., a Florida Corporation,

Defendant.

Case No. 94-C-169-K

AGREED ORDER APPROVING SETTLEMENT AND ADMINISTRATIVE CLOSING ORDER

NOW ON THIS 4th day of Jan., 1995, there comes on the joint request of plaintiff NOVUS Credit Services, Inc. and defendant Mitchell Motor Coach Sales, Inc. for the approval of the Stipulations and Agreement of Settlement, dated December 15, 1994, between the parties, and for the administrative closing of this suit pending performance of said Settlement terms. The Court, being fully apprised, finds that the terms of the Stipulations and Agreement of Settlement between the parties should be approved, and that this case should be administratively closed, subject to re-opening for dismissal or entry of judgment pursuant to the terms of the Stipulations and Agreement of Settlement dated December 15, 1994 between the parties herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Stipulations and Agreement of Settlement dated December 15, 1994, between plaintiff and defendant herein be and is hereby approved, and that this case be and is hereby administratively closed, subject to re-opening for dismissal or entry of judgment, according to the terms of said

16

Stipulations and Agreement of Settlement herein. AND IT SO SO ORDERED.

UNITED STATES MAGISTRATE JUDGE

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

APPROVED AND AGREED TO:

NOVUS Credit Services, Inc.,
Plaintiff

By: Robert Thornton
Robert Thornton
General Manager

Thomas E. English, OBA No. 10532
Carol Wood, OBA No. 10532
English & Wood, P.C.
15 West Sixth Street, Suite 1700
Tulsa, Oklahoma 74119-5466
(918) 582-1564
ATTORNEYS FOR PLAINTIFF

MITCHELL MOTOR COACH SALES, INC.,
Defendant

By: Harvey Mitchell
Harvey Mitchell, President

James Tilly, OBA No. ____
Craig Fitzgerald, OBA No. ____
Tilly & Ward
2 West 2nd Street, Suite 2220
Tulsa, Oklahoma 74103-3645
(918) 583-8868
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES FLOYD PRICE,

Petitioner,

vs.

JACK COWLEY, et al.,

Respondents.

No. 92-C-835-E
(Base File)

92-C-865-E

ENTERED ON DOCKET
DATE 1-5-95

FILED
DEC 28 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On November 10, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 10, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 27th day of December, 1994.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL J. CUTRIGHT aka MIKE J. CUTRIGHT aka MIKE CUTRIGHT, individually, and dba STRAIGHT CONTRACTING; **KARLA S. CUTRIGHT; FORD MOTOR CREDIT COMPANY; HILLCREST MEDICAL CENTER**, a corporation; **STATE OF OKLAHOMA** ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION; **AMERICAN GLASS & METAL, INC.**, Tenant; **RANTECH**, a corporation, Tenant; **COUNTY TREASURER**, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma; **BILL INHOFF**, Tenant; **SOONER EMERGENCY SERVICE, INC.**, Tenant,

Defendants.

CIVIL ACTION NO. **93-C-602-E**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4 day of Jan, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, appear by their attorney Cliff A. Stark; the Defendant, **Hillcrest Medical**

Center, a corporation, appears by its attorney K. Jack Holloway; that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, appears not, having previously filed its Disclaimer; the Defendant, **American Glass & Metal, Inc., Tenant**, appears by its attorney R. Kenneth King; that the Defendant, **RanTech, a corporation, Tenant**, appears by its attorney Roger R. Scott; the Defendant, **Bill Inhoff, Tenant**, appears by his attorney Robert G. Green; the Defendants, **Ford Motor Credit Company and Sooner Emergency Service, Inc., Tenant**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, were served with Application for Pre-Judgment Receiver, Summons and Complaint, and Clerk's Notice of Pre-Judgment Receiver on July 6, 1993; that the Defendant, **Ford Motor Credit Company**, was served with Summons and Complaint on August 10, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, acknowledged receipt of Summons and Complaint on July 9, 1993; that the Defendant, **American Glass & Metal, Inc., Tenant**, acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, **RanTech, a corporation, Tenant**, acknowledged receipt of Summons and Complaint on July 15, 1993; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged

receipt of Summons and Complaint on July 6, 1993; that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 6, 1993; that the Defendant, **Bill Inhoff, Tenant**, acknowledged receipt of Summons and Amended Complaint on November 1, 1993; and that the Defendant, **Sooner Emergency Service, Inc., Tenant**, executed a Waiver of Service of Summons through its registered service agent on June 1, 1994, which Waiver was filed on June 20, 1994.

It appears that the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting and Karla S. Cutright**, filed their Answer on September 21, 1993; that the Defendant, **Hillcrest Medical Center, a corporation**, filed its Answer on July 23, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, filed its Disclaimer of Interest and Consent to Judgment on July 15, 1993; that the Defendant, **American Glass & Metal, Inc., Tenant**, filed its Answers on July 28, 1993 and November 29, 1993; that the Defendant, **RanTech, a corporation, Tenant**, filed its Answers on July 20, 1993 and November 2, 1993; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, filed its Answer on July 14, 1993; that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, filed its Answer on August 10, 1993; that the Defendant, **Bill Inhoff, Tenant**, filed his Answer on November 23, 1993; and that the Defendants, **Ford Motor Credit Company and Sooner Emergency Service, Inc., Tenant**,

have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on July 16, 1991, Michael J. Cutright dba Straight Contracting filed his voluntary petition in bankruptcy in Chapter 11 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-02475-W. On June 29, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma entered an Order Abandoning Property directing abandonment of the real property subject to this foreclosure action described below.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Beginning at a point on the South Right-of-Way line of West 21st Street; said point being South 89°53'17" East, a distance of 814.38 feet along the South Right-of-Way line of West 21st Street from the Intersection of the East Right-of-Way line of West 49th Street and the South Right-of-Way line of West 21st Street; said Right-of-Way Intersection point being 50.00 feet South and 24.75 feet East of the Northwest Corner of Section Sixteen (16), Township Nineteen (19) North, Range Twelve (12) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof, thence South 00°08'30" West, a distance of 705.04 feet to a point; thence North 89°53'17" West, a distance of 215 feet to a point; thence North 00°08'30" East, a distance of 705.04 feet to a point; thence South 89°53'17" East, a distance of 215 feet to the Point of Beginning.
AND

Beginning at a point 369.13 feet East and 50.00 feet South of the Northwest Corner of Section Sixteen (16), Township Nineteen (19) North, Range Twelve (12) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof; thence South 89°53'17" East along the South Right-of-Way line of West 21st Street, a distance of 255.00 feet to a point; thence South 0°08'30" West a distance of 705.04 feet to a point; thence North 89°53'17" West a distance of 255.36 feet to a point; thence North 0°10'17" East a distance of 705.04 feet to the Point of Beginning, containing 4.130 acres, more or less.

The Court further finds that on April 28, 1988, Michael J. Cutright dba Straight Contracting executed and delivered to the American Bank of Commerce his promissory note in the amount of $250,000.00, payable in monthly installments, with interest thereon at the rate of 10.75 percent per annum with rate of interest increasing or decreasing quarterly to become a rate of 2.25 percent per annum over the minimum prime lending rate for large U.S. Money Center Commercial Banks as published in the Money Rates Section of the Wall Street Journal.

The Court further finds that as security for the payment of the above-described note, Michael J. Cutright and Karla S. Cutright executed and delivered to the American Bank of Commerce, an Oklahoma Banking Corporation, a real estate mortgage dated April 28, 1988, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 4, 1988, in Book 5097, Page 614, in the records of Tulsa County, Oklahoma, but was corrected and re-recorded on May 11, 1988 in Book 5098, Page 1956.

The Court further finds that on August 16, 1991, American Bank of Commerce, an Oklahoma Banking Corporation, executed and delivered to the United States of America, acting on behalf of the Small Business Administration, an Assignment of Mortgage of Real Estate covering the above-described property. Interest on the unpaid balance accrued at the note rate from the date of default until August 21, 1991, on which date the note rate became fixed at 11 percent. This assignment was recorded on September 11, 1991, in Book 5348, Page 0909, in the records of Tulsa County, Oklahoma. However, this assignment referred only to mortgage filed on May 4, 1988, in Book 5097, Page 614, in the records of Tulsa County, Oklahoma. On May 13, 1993, the Federal Deposit Insurance Corporation, as Receiver for American Bank of Commerce, Oklahoma City, Oklahoma, executed and delivered to the United States of America, acting on behalf of the Small Business Administration, an Assignment of Mortgage covering the above-described property and referred to corrected mortgage recorded in Book 5098, Page 1956, in the records of Tulsa County, Oklahoma. This assignment was recorded on May 25, 1993, in Book 5505, Page 2437, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which

default has continued, and that by reason thereof the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, are indebted to the Plaintiff in the principal sum of $257,152.80, plus accrued interest of $47,982.72 as of December 29, 1992, plus accruing interest at the rate of 11 percent per annum or $77.50 per day, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $2,051.00, plus penalties and interest, for the year 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Hillcrest Medical Center, a corporation**, has a lien on the property which is the subject matter of this action by virtue of a Judgment, District Court of Tulsa County, State of Oklahoma, dated March 21, 1991, and recorded on March 26, 1991 in Book 5311, Page 0176 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **American Glass & Metal, Inc., Tenant**, has a lien on the property which is

the subject matter of this action by virtue of a Material or Mechanic's Lien, dated July 30, 1992, and recorded on August 3, 1992, Lien No. L92 04877, in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **American Glass & Metal, Inc., Tenant**, has a claim on the property by virtue of a lease, but the Court finds that any and all leasehold rights will terminate upon confirmation of the sale of the subject real property.

The Court further finds that Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting and Karla S. Cutright**, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, **RanTech, a corporation, Tenant**, has a claim on the property by virtue of an oral lease, but the Court finds that any and all leasehold rights will terminate upon confirmation of the sale of the subject real property.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Bill Inhoff, Tenant**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Ford Motor Credit Company and Sooner Emergency Service, Inc., Tenant**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Small Business Administration, have and recover judgment **in rem** against the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, in the principal sum of $257,152.80, plus accrued interest of $47,982.72 as of December 29, 1992, plus accruing interest at the rate of 11 percent per annum or $77.50 per day, plus interest thereafter at the current legal rate of 7.22 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $2,051.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Hillcrest Medical Center, a corporation**, have and recover judgment in the amount due and owing on a Judgment, District Court of Tulsa County, State of Oklahoma, dated March 21, 1991, and recorded on March 26, 1991 in Book 5311, Page 0176 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **American Glass & Metal, Inc., Tenant**, have and recover judgment in the amount due and owing on a Material or Mechanic's Lien, dated July 30, 1992, and recorded on August 3, 1992, Lien No. L92 04877, in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all leasehold rights now held by the Defendant, **American Glass & Metal, Inc., Tenant**, will terminate upon confirmation of the sale of the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all leasehold rights now held by the Defendant, **RanTech, a corporation, Tenant**, will terminate upon confirmation of the sale of the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting; Karla S. Cutright; State of Oklahoma ex rel. Oklahoma Employment Security Commission; RanTech, a corporation, Tenant; Board of County Commissioners, Tulsa County, Oklahoma, Bill Inhoff, Tenant; Ford Motor Credit Company; and Sooner Emergency Service, Inc., Tenant,** have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Michael J. Cutright aka Mike J. Cutright aka Mike Cutright, individually, and dba Straight Contracting, and Karla S. Cutright**, to satisfy the **in rem** judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:
In payment of the judgment rendered herein in favor of the Defendant, Hillcrest Medical Center, a corporation;

Fifth:
In payment of the judgment rendered herein in favor of the Defendant, American Glass & Metal, Inc., Tenant.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Judgment of Foreclosure
Civil Action No. 93-C-602-E

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Judgment of Foreclosure
Civil Action No. 93-C-602-E

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Judgment of Foreclosure
Civil Action No. 93-C-602-E

R. Kenneth King

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Judgment of Foreclosure
Civil Action No. 93-C-602-E

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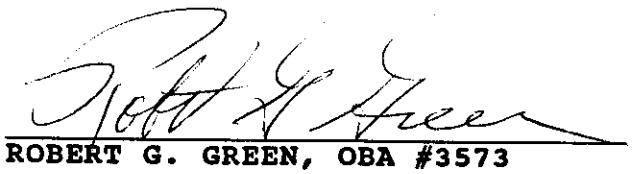
Judgment of Foreclosure, Revised 12-2-94 RRS.
Civil Action No. 93-C-602-E



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Judgment of Foreclosure
Civil Action No. 93-C-602-E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY M. COLE, Plaintiff,	)	
v.	)	93-C-0784-K
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary, Defendant.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Randy M. Cole applied for Social Security disability benefits, alleging he could no longer work. The Secretary of Health and Human Services denied the application. Mr. Cole has appealed that decision to this Court[1] and the matter has been referred to the United States Magistrate Judge.

The narrow issue is whether substantial evidence supports the Secretary's determination that Mr. Cole was not disabled between March 28, 1991 and January 28, 1993. Mr. Cole contends that back problems and depression prevented him from working during that time. The Administrative Law Judge ("ALJ"), however, found that he could return to work in jobs such as a construction helper, a supplier helper, bench assembler, a cook's helper and in traffic control. For the reasons discussed below, the Magistrate Judge recommends the case be **remanded**.

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[2] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler,* 707 F.2d 1284, 1285 (11th Cir. 1985).[3]

II. Summary of Medical Evidence

Born on September 22, 1951, Mr. Cole graduated from high school and attended two years of college. His past relevant work was as an insulator. Mr. Cole applied for Social Security disability benefits, alleging a disability since March 28, 1991 due to back problems, bursitis in his shoulder, headaches and depression.

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[2] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record.* Social Security Law and Practice, *§37.1 (1993).*

[3] *A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends.* Gossett v. Bowen, *862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found, at step 5, that Cole could return to work.*

During an October 6, 1992 hearing before the ALJ, Mr. Cole testified that he was 5-foot-9, 204 pounds. He said he last worked in March of 1991, but was laid off because his depression caused him to miss work frequently. He testified that he considers suicide "all the time" and has attempted to kill himself five times. Mr. Cole also said he has pain in his back and bursitis in his right shoulder. He said he cannot reach over his head when the bursitis is acting up and that headaches sometimes stop him "in his tracks." He also testified that he can walk a mile-and-a-half, stand 20 minutes, lift 25 pounds and sit for two or three hours. *Record at 63-73.*

Two other persons testified at the hearing. Dr. John Gray, a medical expert hired by the Secretary, testified that Mr. Cole met Listing 12.04. Dr. Gray testified that Mr. Cole has memory problems and difficulty in comprehending. The doctor also testified that Mr. Cole had problems doing simple tasks and could not follow complex instructions on an independent basis. *Id. at 90.* Dr. Gray also testified that the record indicates Mr. Cole was considered unreliable by past employers because he left jobs and had too much stress when dealing with his co-workers. *Id.* Dr. Gray completed a Psychiatric Review Technique.

The third person to testify at the hearing was the Vocational Expert. In response to the ALJ's "hypothetical" questions, she testified that Mr. Cole could return to work in jobs such as a construction helper, a supplier helper, bench assembler, a cook's helper and in traffic control.[4] However, the Vocational Expert also, in response to questions from Mr.

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[4] *The ALJ asked the following hypothetical question: "I first want you to assume that this hypothetical person is capable of lifting no more than 50 pounds and frequently lift or carry 25 pounds. [He] cannot reach over shoulder level with the right arm, occasionally stoop or crouch, simple but not complex tasks, and no dealing with the general public." Id. at 97. The vocational expert also testified that, if all of Cole's testimony was taken as true, would "extremely" limit his ability to work. Id. at 101.*

Cole's attorney, testified that Mr. Cole's depression, if as severe as the record suggested, could prevent him from working. *Id. at 95-104.*

In addition to the testimony, the other pertinent evidence is as follows: On August 29, 1991, an Intake Summary by Mental Healthcare Services of Tulsa indicated that Mr. Cole had Dysthymic Disorder of Major Proportions, Alcohol Dependence, Borderline Personality Disorder and "chronic mental illness." *Id. at 297.* The intake also indicated that Mr. Cole's symptoms shows "prominent suicidal thinking with apparent repeated suicide attempts" and that he needed to be monitored on a "fairly close" basis. *Id. at 298.* The same clinic reported a similar assessment on March 11, 1992, diagnosing him with "major depression." The clinic also noted that the "severity of [Mr. Cole's] depression makes it impossible [for him] to follow through with instructions." *Id. at 308.*

On December 27, 1991, Dr. Thomas Goodman, a consulting psychiatrist for the Secretary, examined Mr. Cole. Dr. Goodman found no evidence of "any kind of psychotic illness or of any delineated neurotic symptom complex." *Id. at 301.* Dr. Goodman diagnosed Mr. Cole with recurrent depressive disorder in remission. He noted that Mr. Cole could use judgment in some abstract thinking. *Id. at 302.*

Dr. Carolyn Goodrich gave Mr. Cole a psychiatric examination on January 8, 1992. Dr. Goodrich found that Mr. Cole was capable of understanding and performing simple tasks, but not complicated ones. Dr. Goodrich also indicated that Mr. Cole could appropriately interact with co-workers and supervisors, but not the general public. She noted he could adapt to a work situation. Dr. Goodrich also filled out a Psychiatric Review Technique form and found that Mr. Cole did not meet any listing. *Id. at 178-188.*

On March 11, 1992, Dr. Robert Harris examined Mr. Cole. Dr. Harris, a consulting physician for the Secretary, found that Mr. Cole had stiffness and decreased motion in his right shoulder and back pain. Dr. Harris noted that Mr. Cole had "some degree of depression." *Id. at 330.*

III. Legal Analysis

At least three issues can be gleaned from Mr. Cole's brief.[5] First, did the ALJ err by rejecting the testimony of the Secretary's medical expert? Second, did the ALJ err in rejecting the evidence submitted by therapists treating Mr. Cole? Last, does substantial evidence support the Secretary's decision that Mr. Cole can return to work?

As a general proposition, the responsibility to sift through the facts, analyze the evidence and come to a conclusion belongs to the ALJ. Often times, this requires him to make determinations of witness credibility and decide what weight to give to certain evidence. These types of fact-finding decisions, absent legal error, will not be second-guessed by the Court. *See, generally, Tillery v. Schweiker,* 713 F.2d 601 (10th Cir. 1983) (Court acknowledged that "the evidence is such as to permit varying inferences...[but] the ALJ came to grips with the problem, and, on such state of the record, for us to disturb his finding would simply put us into the fact-finding business. This we should not do.")

Using this general proposition as background, the first issue is whether the ALJ erred by rejecting the findings of Dr. Gray. Gray, the Secretary's own medical expert,

[5] *Cole's brief does not clearly identify the issues raised and only cites to legal authority twice. A better practice is to succinctly identify the issues and then support the argument with sufficient case law.*

testified that Mr. Cole met Listing 12.04.[6] Obviously, had the ALJ placed significant weight on Gray's testimony, he would have found Mr. Cole to be disabled. However, the ALJ rejected Dr. Gray's findings because they were not supported by the "record as a whole." *Record at 31.* Nothing prevents the ALJ from making that determination, especially since Dr. Gray did not examine Mr. Cole. He simply reviewed the medical records. *See. Weir v. Heckler,* 734 F,2d 955, 963 (3d Cir. 1984)("opinions of doctors who have never examined patient have less probative force, as a general matter, than they would have had if they had treated or examined him.")

The second issue is whether the ALJ erred by placing little, if any, weight on the findings of Mr. Cole's treating therapists and/or psychologists.[7] The "*treating physician rule*" mandates that the Secretary give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler,* 742 F.2d 1232, 1235 (10th Cir. 1984). One decision explains the reasoning behind the rule:

> **The treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant...relevant to other medical evidence before the fact-finder, including opinions of other physicians. The rule...provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more**

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[6] *Listing 12.04 is an "Affective Disorder" that is "characterized by a disturbance or mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation." 20 C.F.R. 404, Subpart P, Appendix 1.*

[7] *In his brief, Cole argues that the ALJ "ignores the extensive mental health records of the claimant's own treating physician. The ALJ chooses to cite the report of Dr. Goodman...over the current records of the claimant's treating psychologist and Dr. Gray." Cole's Brief at page 5 (docket #10). The problem with this argument is that Cole does not identify the name of treating physician and/or psychologist. In addition, it is difficult to determine what parts of the Record Cole wishes to make part of his argument. As a result, the undersigned assumes that Cole is referring to the records from Mental Healthcare Services.*

> **familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.** *Kemp v. Bowen,* 816 F.2d 1469, 1476 (10th Cir. 1987).

In this case, the record shows that Mental Healthcare Services treated Mr. Cole off-and-on from August 21, 1991 until September 29, 1992. Throughout the treatment time, the agency's records indicate that Mr. Cole suffered from depression and, at times, was suicidal. A March 11, 1992 assessment by Dr. David McElwain suggested that Mr. Cole could not work because of the depression. This assessment is consistent with the on-going treatment notes.

The ALJ rejected their assessments and, in effect, attempted to explain away Mr. Cole's alleged impairment of depression. The undersigned, however, finds the ALJ's rationale questionable.[8] Consequently, the ALJ violated the "treating physician" rule and should have placed greater weight on the reports from the Mental Healthcare Services.

The finding that the ALJ violated the "treating physician" rule does not, in itself, mean the decision is incorrect. The overriding question (and the third issue) is whether substantial evidence supports the Secretary's decision that Mr. Cole can return to work. Review of the record shows that such evidence does not support the Secretary's decision

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[8] *The ALJ wrote that he believed the various assessments made by the therapists were inconsistent. He then noted that the assessments were not based only on statements made by Cole. He also offered the following explanation: "Although the claimant was tearful during interview with Georgia Dwyer [a client advocate] there was not evidence that claimant was otherwise "unable to control his crying" as she stated. In fact, based on the evidence in the remainder of the record, episodes of tearfulness appeared to be related to specific instances of emotional involvement such as the one time claimant had just read a popular emotion-eliciting novel and had begun to think of his deceased brother. Another time was specifically related to phone calls from his mother, who apparently also is depressed, and claimant's depression feeds off hers. Still another episode was related to claimant's mother was claimant to get rid of the claimant's dog...All of these specific episodes over a period of 2 years are not proof of unexplained "uncontrolled crying episodes" indicative of a mental illness. An individual might well be expected to have some emotional reaction to thoughts of his deceased brother or to the threat of loving his beloved pet. However, such emotional reaction is normal and not evidence of a mental illness."* Record *at 36. It appears the ALJ is interposing his own expertise for that of the mental health care professionals. Such is improper. See* Kemp, *816 F.2d at 1476 ("While the ALJ is authorized to make a final decision concerning disability, he cannot interpose his own medical expertise over that of a physician.")*

and that the case should be remanded.

For the most part, the ALJ relied on evidence submitted by the three consulting physicians and testimony by the Vocational Expert. He either rejected or discounted the testimony of Mr. Cole, the testimony of Dr. Gray and evidence submitted by Mental Healthcare Services. In effect, the ALJ rejected all findings that supported Mr. Cole's position.

The undersigned finds that too much emphasis was placed on the examinations of the consulting physicians. Unlike the professionals at Mental Healthcare Services, the Secretary's physicians examined Mr. Cole only one time each. Dr. Goodman examined Mr. Cole on December 27, 1991; Dr. Goodrich examined him on January 8, 1992 and Dr. Harris treated Mr. Cole on March 11, 1992. Their findings carry some weight, but do not override the opinions of those treating Mr. Cole over a period of time. *See, Broadbent v. Harris*, 698 F.2d 407, 412 (10th Cir. 1983)(opinions of physicians who have treated patient over a period of time are given greater weight than are reports by physicians employed and paid by the government for the purpose of defending against a disability claim.)

In addition, the Vocational Expert testimony can not support the ALJ's finding. The general rule is that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). Here, the ALJ's hypothetical disregarded any testimony and/or evidence concerning Mr. Cole's depression. Substantial evidence indicates that Mr. Cole suffered from depression, although

it is unclear as to what degree. The ALJ erred by not addressing that depression in his hypothetical and, as a result, the testimony elicited by the ALJ's hypothetical question cannot constitute substantial evidence.

The ALJ failed to place substantial weight on the opinion of the treating mental health care professionals. Instead, he gave significant weight on the consulting physicians and on the vocational expert -- which he should not have done. Thus, it is unclear whether depression precludes Mr. Cole from working.

IV. Conclusions

The ALJ's handling of the evidence concerning Mr. Cole's depression is suspect.[9] First, at step 5 of the sequential analysis, the Secretary has the burden to prove that Mr. Cole can work. That burden has not been met. Second, the ALJ rejected the testimony of his own medical expert who said Mr. Cole was disabled. Such a finding is within his discretion, but, given the circumstances raises questions. Third, the ALJ rejected the reports of Mental Healthcare Services. He gave no reason deemed "legitimate" by the undersigned and, in fact, it appears he substituted his own "expert" opinion on Mr. Cole's mental health with that of some of the professionals. Fourth, he placed too much weight on the findings of the consultative physicians who examined Mr. Cole one time. Last, he failed to include Mr. Cole's depression when questioning the vocational expert. The cumulative effect of these errors is that it is unclear as to whether Mr. Cole can return to work. Therefore, the United States Magistrate Judge recommends the case should be **REMANDED.**

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[9] *Substantial evidence also supports the finding that Cole did not meet a Listing. Therefore, on remand, the issue focuses on step 5 of the sequential analysis (i.e., can Cole return to work).*

On remand, the question is whether Mr. Cole's mental impairment (i.e., depression) keeps him from returning to work. The record clearly indicates that Mr. Cole suffers from depression, but it is unclear as to what degree. As a result, the ALJ must re-examine the evidence in light of this opinion and then hold a supplemental hearing where the vocational expert again testifies.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[10]

Dated this 3rd day of Jan., 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[10] *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLORIA JEAN DREW;
aka Gloria J. Drew
aka Gloria Drew
aka Gloria Peoples;
REUBEN E. DREW, JR.;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-751-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day of January, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, GLORIA JEAN DREW and REUBEN E. DREW, JR., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GLORIA JEAN DREW, signed a Waiver of Summons on August 13, 1994, filed on August 31, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX

COMMISSION, was served a copy of Summons and Complaint on August 4, 1994, by Certified Mail.

The Court further finds that the Defendant, REUBEN E. DREW, JR., was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 26, 1994, and continuing through October 31, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, REUBEN E. DREW, JR., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, REUBEN E. DREW, JR. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States

Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 23, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 29, 1994; and that the Defendants, GLORIA JEAN DREW and REUBEN E. DREW, JR., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 6, 1988, Gloria Jean Drew filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 88-03716-C. On May 16, 1989, the United States Bankruptcy Court for the Northern District of Oklahoma filed a Discharge of Debtor, the case was subsequently closed on June 23, 1989.

The Court further finds that on December 31, 1990, Gloria Jean Drew filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-04207-W. On November 6, 1992, the United States Bankruptcy Court for the Northern District of

Oklahoma filed a Discharge of Debtor, a second Discharge of Debtor was filed on December 8, 1992, the case was subsequently closed on March 30, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Thirteen (13), Block Fifteen (15), SUMMIT HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that on January 27, 1986, Richard A. Bondy, executed and delivered to Investors Universal Service Corp., his mortgage note in the amount of $45,164.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10½%) per annum.

The Court further finds that as security for the payment of the above-described note, Richard A. Bondy, a single person, executed and delivered to Investors Universal Service Corp., a mortgage dated January 27, 1986, covering the above-described property. Said mortgage was recorded on January 29, 1986, in Book 4921, Page 1359, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 6, 1986, Investors Universal Service Corp., assigned the above-described mortgage note and mortgage to Security Pacific Mortgage Corporation. This Assignment of Mortgage was recorded on

February 21, 1986, in Book 4925, Page 1335, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1987, Security Pacific Mortgage Corporation, assigned the above-described mortgage note and mortgage to Fleet Real Estate Funding Corp. This Assignment of Mortgage was recorded on April 11, 1988, in Book 5092, Page 1982, in the records of Tulsa County, Oklahoma. A Corrected Assignment was filed on July 29, 1988, in Book 5118, Page 192.

The Court further finds that on June 20, 1988, Fleet Real Estate Funding Corp., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 29, 1988, in Book 5118, Page 193, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 5, 1987, Richard A. Bondy, a single person, granted a general warranty deed to the Defendant, GLORIA JEAN DREW. This deed was recorded with the Tulsa County Clerk on May 7, 1987, in Book 5021, Page 2543, and the Defendant, GLORIA JEAN DREW, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on May 1, 1988, the Defendant, GLORIA JEAN DREW, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between

these same parties on October 1, 1988, June 1, 1989, December 1, 1989, June 1, 1990 and April 1, 1991.

The Court further finds that the Defendant, GLORIA JEAN DREW, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, GLORIA JEAN DREW, is indebted to the Plaintiff in the principal sum of $79,322.86, plus interest at the rate of 10½ percent per annum from May 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $7.00 which became a lien on the property as of July 5, 1989; a lien on the property in the amount of $6.00 which became a lien on the property as of July 2, 1990; a lien in the amount of $26.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $19.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of $19.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of

state taxes in the amount of $132.72 which became a lien on the property as of May 27, 1986. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GLORIA JEAN DREW and REUBEN E. DREW, JR., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, GLORIA JEAN DREW, in the principal sum of $79,322.86, plus interest at the rate of 10½ percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and

recover judgment in the amount of $77.00, plus accruing costs and interest, for personal property taxes for the years 1988, 1989, 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $132.72, plus accrued and accruing interest, for state taxes for the year 1981, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, GLORIA JEAN DREW and REUBEN E. DREW, JR., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, GLORIA JEAN DREW, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $132.72, state taxes which are currently due and owing, plus interest accrued and accruing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $77.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

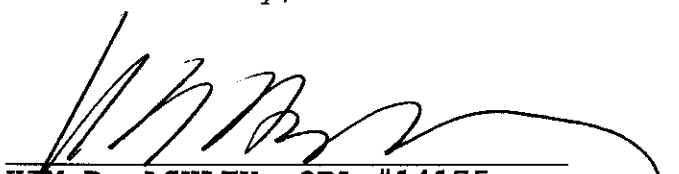
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-751-K

NBC:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATIE C. COLE,

Plaintiff,

vs.

CEDAR RIDGE COUNTRY CLUB,

Defendant.

No. 94-C-261-K

O R D E R

By Order filed December 16, 1994, the plaintiff was granted until December 30, 1994 in which to effect service or show good cause for the failure. Plaintiff has failed to comply with the Order. Pursuant to Rule 4(m) F.R.Cv.P., dismissal is appropriate.

It is the Order of the Court that the above-styled case is hereby dismissed without prejudice.

ORDERED this 3 day of January, 1995.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL W. MARTIN and LOU ESTHER NICKELL,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ex rel. MANUEL LUJAN, JR., Secretary of the Interior for the UNITED STATES DEPARTMENT OF INTERIOR,

Defendants.

Case No. 92-C-88-E

O R D E R

Now before the Court is the Appeal of the Plaintiffs Michael W. Martin (Martin) and Lou Esther Nickell (Nickell) of the determination of the Secretary of the Interior regarding the validity of the will of Winona Anderson (Anderson), an Osage Indian. The parties agree that no discovery is necessary and the matter has been submitted on the administrative record.

Anderson died testate of February 26, 1989 at the age of 82. At the time of her death she owned one Osage headright interest subject to the jurisdiction of the Secretary of the Interior. She left the entirety of her estate, in equal shares, to her brothers and sisters: Wheeler Eagle Brock, Luther E. Brock, Inez Martin and Lou Esther Nickell. She was, however, predeceased by Wheeler Eagle Brock and Inez Martin. Wheeler Eagle Brock has a son Lou Walter Brock, and Inez Martin has a son Michael W. Martin. However, these offspring are not mentioned in Anderson's will.

Michael Martin and Lou Esther Nickell filed a petition for

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approval of the will, claiming that they, Luther E. Brock and Lou Walter Brock constitute the "heirs, beneficiaries, devisees, and legatees" of Anderson, and that her will should be approved. Subsequently, Nickell and Martin filed a Motion to Amend Petition, deleting Lou Walter Brock as one of the "heirs, beneficiaries, devisees, and legatees" of Anderson. In their Motion to Amend, Nickell and Martin assert that Lou Walter Brock is not of Osage Blood and was never adopted by Wheeler Eagle Brock in a court of competent jurisdiction.

By Order dated February 2, 1990, the Superintendent of the Osage Indian Agency approved Anderson's will and determined that Lou Walter Brock is of Osage Indian Blood and that he is one of Anderson's heirs.[1] Nickell and Martin appealed the Order, and it was affirmed by the acting Regional Solicitor on January 6, 1992. In this appeal, Nickell and Martin agree that the will was properly approved, but take issue with the factual finding regarding Lou Walter Brock. They argue that the factual finding regarding Lou Walter Brock was outside the jurisdiction of the Secretary and that the finding is against the clear weight of the evidence.

Legal Analysis

1. Jurisdiction of the Secretary:

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[1] The Secretary specifically found:

> 3. That at the time of Testatrix's death, she was survived by her sister, Lou Ester Nickell, bother Luther Earl Brock, and nephews, Michael W. Martin and Lou Walter Brock, all of whom are of Osage Indian blood; and constitute her heirs under provisions of the Oklahoma law of intestate succession

Nickell and Martin argue that the Secretary's jurisdiction is limited to approving or disapproving the will of an Osage Indian, and the Secretary exceeded this jurisdiction when he made a factual finding determining Anderson's heirs. The Secretary does not dispute that the probate courts of the State of Oklahoma determine the heirs of an Osage Indian. The Secretary, however, argues that federal law precludes the operation of Oklahoma law under the circumstances of this case if the adopted child is not Osage, because Section 10 of the Osage Tribe of Indians Technical Correction Act of 1984, 98 Stat. 3163, provides that an adopted child is not entitled to inherit Osage property held in trust by the Secretary unless the child is of Osage blood.

The Secretary asserts that in light of the complex limitations on eligibility to inherit an interest in Osage property under the 1978 Act, as amended by the 1984 Act, the Secretary must make a determination of the Osage Blood of a named devisee in order to determine the validity of invalidity of an Osage will under federal law. For this proposition, Defendant relies on In the Matter of the Will of Helen Mae Burnett, No 91-C-238-B, (N.D. Okla. 1992)(holding that the devisee was of Osage Indian blood because of the presumption of legitimacy under Oklahoma law, and that the devisee was entitled to inherit the interest devised to her non-Indian brother) and Crawley v. United States, 977 F.2d 1409 (10th Cir. 1992)(holding that the Secretary's approval of Osage wills is subject to the provisions limiting those who can inherit, and stating "If the will is valid under Oklahoma law, the Secretary

must determine whether the will devises to any non-Osage more than a life estate in an Osage headright.")

In the present case, however, the Secretary did not make a determination as to the Osage blood of a named devisee, because neither Martin nor Lou Walter Brock is named in Anderson's will. Nevertheless, the Regional Solicitor, on appeal, found that the Secretary had jurisdiction in this instance, stating:

> In light of the elaborate and detailed provisions in the 1984 Amendment concerning Osage Indian blood, the determination of the validity or invalidity of an Osage will under federal law requires that the Secretary make a determination of the Osage blood of a named devisee. Enforcement of the federal law regarding inheritance of an Osage headright is clearly within the purview of the Secretary of the Interior. In light of the duty of the Secretary to determine whether a named devisee is of Indian blood in order to determine the validity of an Osage will, and in light of Congressional enactment of a system of inheritance for Osage headrights which would require the Secretary of the Interior to determine heirs of Osage Indian blood under the Oklahoma law of intestate succession when there is no designated Osage remainderman, it is illogical to conclude that Congress intended that the Secretary of the Interior would not determine the Osage Indian blood of an heir of a named devisee who predeceased the Testatrix.

(emphasis added). This Court agrees with the analysis of the Solicitor, and holds that the factual finding of the Secretary was within his jurisdiction.

2. Sufficiency of the Evidence:

The Court next turns to the issue of whether the factual finding is supported by the clear weight of the evidence. The evidence in the administrative record which supports the determination that Lou Walter Brock was the natural son of Wheeler Eagle Brock includes:

1. The Certificate of Live Birth of Lou Walter Brock which indicates that Wheeler Eagle Brock is the father of the child;

2. The marriage card of the Department of Interior which lists Lou Walter Brock as a child born of the marriage between Wheeler Eagle Brock and Mildred Vinnie Homan;

3. The final Decree in the Estate of Wheeler Eagle Brock entered by the District Court of Osage County, Oklahoma which determines the heirs of Wheeler Eagle Brock to be Mildred Homan Brock, surviving spouse, and Lou Walter Brock, surviving child; and

4. Various medical records of the Schumpert Sanitarium where Lou Walter Brock was born which list the newborn baby as "Boy Brock' and the mother of the baby as "Mrs. W.E. Brock."

There is also evidence which supports a determination that Lou Walter Brock was not the natural son of Wheeler Eagle Brock, and that evidence includes:

1. Lou Walter Brock's initial testimony that he was the adopted son Wheeler Eagle Brock;

2. Testimony by Lou Esther Nickell that Mildred Brock had a hysterectomy prior to the date of birth of Lou Walter Brock;

3. The Schumpert Memorial Sanitarium delivery record lists the age of the mother as 22, although the Certificate of Live Birth lists the age of the mother as

40; and

4. The certificate of Live Birth was issued by the Louisiana State Department of Health of November 4, 1957, but the date of birth of Lou Walter Brock is September 25, 1955.[2]

The evidence definitely places into question whether Mildred Vinnie Homan Brock was the natural mother of Lou Walter Brock. Even if she is not, however, the possibility that Wheeler Eagle Brock was the natural father of the child is not precluded. There is no other explanation in the administrative record for fact that the birth records of the child all reflect the name "Boy Brock." Thus, the Court finds that the determination regarding the Osage blood of Lou Walter Brock is not against the clear weight of the evidence.

The Appeal of Martin and Nickell is denied and the decision of the Secretary is affirmed.

IT IS SO ORDERED THIS 3rd DAY OF DECEMBER, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

[2] Plaintiffs argue that the finding of the Secretary should be reversed because of evidence that the blood types of Wheeler Eagle Brock and Lou Walter Brock preclude the possibility that Wheeler Eagle Brock was the natural father of Lou Walter Brock. This evidence was not submitted within the time period prescribed by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1661, which requires all evidence to be submitted within 120 days after the date the petition for approval of the will is filed (or within 120 days and six months if an extension is granted), and therefore will not be considered by this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, AS RECEIVER OF SOONER FEDERAL SAVINGS ASSOCIATION,

Plaintiff,

vs.

FINANCIAL INSTITUTIONS RETIREMENT FUND, in its capacities as a pension plan and trust and as plan sponsor of The Comprehensive Retirement Program; and THE BANK OF NEW YORK, as Trustee of The Comprehensive Retirement Program,

Defendants.

Case No. 92-C-1042-E

JUDGMENT

WHEREAS, the Court by Order filed october 7, 1994 granted Plaintiff's Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment;

WHEREAS, by Order filed December 8, 1994 the Court denied Defendants' Motion for Reconsideration and requested that the parties submit a Joint Order of Judgment; and

WHEREAS, the parties have different positions on the proper amount of any judgment and the applicability of an award of costs, but nonetheless desire to avoid further litigation regarding the judgment; and

WHEREAS, the parties have agreed to a compromise on the judgment amount and, preserving their positions as to all issues in this litigation, including the appropriate amount of the judgment, have jointly submitted this Order of Judgment.

NOW, therefore, the Court hereby enters judgment in favor of Plaintiff, RESOLUTION TRUST CORPORATION, as Receiver of Sooner Federal Savings Association and against Defendants, FINANCIAL INSTITUTIONS RETIREMENT FUND, in its capacities as a pension plan and trust and as plan sponsor of The Comprehensive Retirement Program and THE BANK OF NEW YORK, as Trustee of The Comprehensive Retirement Program, for the sum of $4,600,000.00, plus costs.

DATED this _____ day of December, 1994.

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Richard B. Noulles, OBA #6919
ATTORNEY FOR PLAINTIFF

Mark S. Edmondson, OBA #11823
Blair Axel
ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HAROLD McBRIDE and SHIRLEY McBRIDE, Plaintiffs,	)	
vs.	)	No. 94-C-582B
INTERPLASTIC CORPORATION, Defendant.	)	ENTERED ON DOCKET DATE 1-4-95

ORDER OF DISMISSAL

On this 3rd day of January, 1995, upon the written application of the Plaintiffs, Harold McBride and Shirley McBride, and the Defendant, Interplastic Corporation, for a Dismissal With Prejudice of the Complaint of McBride v. Interplastic Corporation, and all causes of action therein, the Court having examined said Application finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any further action. The Court being fully advised in the premises finds said settlement is to the best interest of said Harold McBride and Shirley McBride.

THE COURT FURTHER FINDS that said Complaint in McBride v. Interplastic Corporation should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs, Harold McBride and Shirley McBride, against the Defendant, Interplastic Corporation be and the same hereby are dismissed with prejudice to any further action.

Judge of the United States District Court

Approvals:

ED ABEL, Attorney for Plaintiff

RICHARD D. WAGNER, Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBORAH MARIE COUCH,
WENDE B. LANE,
DIANE MARIE PURKEY,
BRENDA LOZANO,
TERESA STAMPS,
all individuals, plaintiffs,

v.

MAYES EMERGENCY SERVICE TRUST AUTHORITY, and JEFF CURTSINGER in his official and individual capacities, defendants.

Case No. 94-C-1125-B

ORDER ACKNOWLEDGING STIPULATION TO DISMISS WITH PREJUDICE.

ORDER ACKNOWLEDGING STIPULATION TO DISMISS WITH PREJUDICE.

Plaintiffs DEBORAH MARIE COUCH, WENDE B. LANE, DIANE MARIE PURKEY, BRENDA LOZANO, and TERESA STAMPS (hereinafter "plaintiffs"), and defendants, MAYES EMERGENCY SERVICE TRUST AUTHORITY (hereinafter "MESTA"), and JEFF CURTSINGER (hereinafter "CURTSINGER" or collectively with MESTA, hereinafter "defendants"), have stipulated to dismissal with prejudice of this action.

The parties to this stipulation have informed the Court that each party shall bear its, his, or her own costs and attorney fees incurred in this action.

Dated this 3rd day of Jan, 1995.

Judge, U. S. District Court.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBORAH MARIE COUCH,
WENDE B. LANE,
DIANE MARIE PURKEY,
BRENDA LOZANO,
TERESA STAMPS,
all individuals, plaintiffs,

v.

MAYES EMERGENCY SERVICE TRUST AUTHORITY, and JEFF CURTSINGER in his official and individual capacities, defendants.

Case No. 94-C-82-BU.

ORDER ACKNOWLEDGING STIPULATION TO DISMISS WITH PREJUDICE.

ORDER ACKNOWLEDGING STIPULATION TO DISMISS WITH PREJUDICE.

Plaintiffs DEBORAH MARIE COUCH, WENDE B. LANE, DIANE MARIE PURKEY, BRENDA LOZANO, and TERESA STAMPS (hereinafter "plaintiffs"), and defendants, MAYES EMERGENCY SERVICE TRUST AUTHORITY (hereinafter "MESTA"), and JEFF CURTSINGER (hereinafter "CURTSINGER" or collectively with MESTA, hereinafter "defendants"), have stipulated to dismissal with prejudice of this action.

The parties to this stipulation have informed the Court that each party shall bear its, his, or her own costs and attorney fees incurred in this action.

Dated this 3rd day of Jan, 1995.

Michael Burrage
Judge, U. S. District Court.

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JANET E. NEAL, individually, and as Parent and Next Friend of SARAH M. NEAL, a Minor,

Plaintiffs,

vs.

STEVEN JOHN COOPER, PATRICIA F. SHAMBLIN, FARMERS INSURANCE COMPANY, INC., and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants.

Case No. 94-C-1032-BU

ORDER

On November 4, 1994, the defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), filed a Notice of Removal removing the above-entitled action to this Court from the District Court of Creek County, Oklahoma. On that same date, the defendant, Farmers Insurance Company, Inc. ("Farmers"), filed a Consent to Removal of Action stating that it joined in and consented to the removal by State Farm. In the Notice of Removal, State Farm asserted that removal was proper under 28 U.S.C. § 1441(a) because the Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1332. On November 8, 1994, the plaintiffs, Janet E. Neal, individually, and as parent and next friend of Sarah M. Neal, a minor, objected to the removal and filed a motion seeking to remand this action to the District Court of Creek County, Oklahoma. In her motion, the plaintiff asserts that removal was improper because removal did not occur within one (1)

year of the action being commenced in state court as required by 28 U.S.C. § 1446(b).[1] She also asserts that removal was premature because the appeal time of the judgment as to the defendants, Steven John Cooper and Patricia F. Shamblin, has not run. The plaintiff further asserts that removal was improper because State Farm's Notice of Removal and Farmers' Consent to Removal of Action were not filed within thirty (30) days of State Farm and Farmers being served with the state court petition. State Farm and Farmers have objected to the plaintiffs' motion.

Upon review of the parties' arguments and authorities and the record herein, the Court concludes that removal was improper and that this matter should be remanded to state court. It is undisputed that State Farm and Farmers did not remove this action within one (1) year of its commencement in state court as required by § 1446(b). Although the courts are divided as to whether or not the one-year time limitation is jurisdictional and can be waived, see, Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992); Foiles v. Merrell Nat'l Labs., A Division of Richardson-Merrell, Inc., 730 F.Supp. 108 (N.D. Ill. 1989); Perez v. General Packer, Inc., 790 F.Supp. 1464 (C.D. Cal. 1992), it is

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[1]28 U.S.C. § 1446(b) provides in pertinent part:

If the case stated by the initial pleading is not removable, a notice may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

clear that the plaintiffs by their conduct have not waived its application. In addition, the Court finds that the circumstances herein do not justify creating an exception to the enforcement of the statutory one-year time limitation.

Accordingly, the plaintiffs' Motion to Remand (Docket No. 7) is GRANTED. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Creek County, Oklahoma.

ENTERED this 3rd day of ~~December~~ Jan, 1994~~1994~~.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

DMB/tsr IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUTOTECH LEASING ASSOCIATES Plaintiff, vs. BROOKS BROTHERS CHRISTIAN ALLIANCE, INC., and RAYMOND ANTHONY BROOKS, II, Defendants.	)	Case No. 94-C-592-K

DEFAULT JUDGMENT

It appearing from the files and records of this Court that on November 16, 1994, Clerks Entry of Default was entered against the Defendants, Brooks Brothers Christian Alliance, Inc., and Raymond Anthony Brooks, II; and that Plaintiff's damages against Defendants are for a sum certain in the amount of $56,619.00 as set forth in the Affidavit of Trandafila Nimanbegovic, plus interest at the statutory rate of 7.22% and costs; now, therefore,

I, Richard M. Lawrence, clerk of said Court, pursuant to the requirements of Rule 55(b)(1) of the Federal Rules of Civil Procedure, do hereby enter Judgment against the Defendants, Brooks Brothers Christian Alliance, Inc., and Raymond Anthony Brooks, II, jointly and severely, in the amount of $56,619.00, plus interest at the statutory rate of 7.22% plus costs.

DATED at Tulsa, this 4 day of Jan, 1995.

RICHARD M. LAWRENCE, CLERK
U.S. DISTRICT COURT

BY: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In RE:	)	
	)	M-1417
ASBESTOS LITIGATION	)	ASB(I) 6641
	)	
RUDELL R. BRYCE and	)	
JEWELL E. BRYCE,	)	No. 89-C-132-C
	)	
Plaintiffs.	)	

JUDGMENT

In keeping with the verdict of the jury herein, rendered on October 20, 1994, Judgment is hereby entered in favor of the plaintiff, Rudell Bryce, and against the defendant, Owens-Corning Fiberglas Corporation, on his negligence claim, in the total amount of $135,592.35. ($175,000.00 less settlement set-offs in the amount of $77,860.00, plus prejudgment interest in the amount of $38,452.35).

Judgment is hereby entered in favor of defendant, Owens-Corning Fiberglas Corporation on plaintiff's claim for manufacturer's products liability.

Judgment is hereby entered in favor of defendant, Owens-Corning Fiberglas Corporation on Jewel Bryce's claim for loss of consortium.

The punitive damage claim, which was reserved by the Multi-District Litigation Panel, and which was not a part of this jury trial, shall specifically be reserved for a determination at a later date. The Court hereby makes an express determination that there is no just reason for delay and hereby directs the entry of final judgment accordingly.

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In accordance with the verdict of the jury rendered on October 20, 1994, the plaintiff is hereby granted actual damages in the amount of $175,000.00, less $77,860.00, the total sum having been previously paid to plaintiff Rudell Bryce by parties other than this defendant, Owens-Corning Fiberglas Corporation, for a net of $97,140.00.

In accordance with 12 O.S. § 727, plaintiff Rudell Bryce is hereby granted prejudgment interest at the rate of 6.99% per annum on the amount owing ($97,140.00), from February 21, 1989 until October 20, 1994, for total prejudgment interest of $38,452.35.

The total amount owed by the defendant, Owens-Corning Fiberglas Corporation to the plaintiff Rudell Bryce, therefore, is $135,592.35.

WHEREFORE, in accordance with the verdict of the jury rendered on October 20, 1994, judgment is hereby entered in favor of the plaintiff, Rudell Bryce and against the defendant, Owens-Corning Fiberglas Corporation, in the total amount of $135,592.35, which represents the amount of the verdict for which Owens-Corning Fiberglas Corporation is liable plus statutory prejudgment interest.

Further, the punitive damage claim, which was reserved by the Multi-District Litigation Panel, and which was not a part of this jury trial, shall specifically be reserved for a determination at a later date. The Court hereby makes an express determination that there is no just reason for delay and hereby directs the entry of final judgment accordingly.

Dated this 3rd day of January, 1995.

H. DALE COOK
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF WILLIE BEATRICE SIMMONS aka Beatrice Simmons, Deceased; **IVA MAE MARSHALL** aka Iva Marshall; **PAUL CHEEK**, Tenant; **FIRST NATIONAL BANK OF CLEVELAND** nka FIRST BANK OF CLEVELAND; **STATE OF OKLAHOMA ex rel.** Oklahoma Tax Commission; **COUNTY TREASURER**, Pawnee County, Oklahoma; and **BOARD OF COUNTY COMMISSIONERS**, Pawnee County, Oklahoma,

Defendants.

FILED

JAN 3 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. **93-C-427-E**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of Jan, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, **County Treasurer, Pawnee County, Oklahoma,** and **Board of County Commissioners, Pawnee County, Oklahoma**, appear by Alan B. Foster, Assistant District Attorney, Pawnee County, Oklahoma; the Defendant, **First National Bank of Cleveland nka First Bank of Cleveland**, appears not, having previously filed its Disclaimer; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, appears not, having previously filed its Disclaimer; and the Defendants, **The Unknown Heirs,**

ENTERED ON DOCKET
DATE 1-4-95

Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased; Iva Mae Marshall aka Iva Marshall; and **Paul Cheek, Tenant**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Iva Mae Marshall aka Iva Marshall**, executed a Waiver of Service of Summons on June 5, 1994; that the Defendant, **Paul Cheek, Tenant**, acknowledged receipt of Summons and Complaint on May 26, 1993; that the Defendant, **First National Bank of Cleveland nka First Bank of Cleveland**, acknowledged receipt of Summons and Complaint on May 11, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee, on May 27, 1994; that Defendant, **County Treasurer, Pawnee County, Oklahoma**, acknowledged receipt of Summons and Complaint on May 11, 1993; and that Defendant, **Board of County Commissioners, Pawnee County, Oklahoma**, acknowledged receipt of Summons and Complaint on May 12, 1993.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased**, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six (6) consecutive weeks beginning August 17, 1994, and continuing through September 21, 1994, as more fully appears from the verified proof

of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the

service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma,** filed their Answer on May 28, 1993; that the Defendant, **First National Bank of Cleveland nka First Bank of Cleveland**, filed its Disclaimer on May 24, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Disclaimer on July 5, 1994; that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased; Iva Mae Marshall aka Iva Marshall**; and **Paul Cheek, Tenant**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages securing said promissory notes upon the following described real property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lots 2, 3 and 4, in Block 27, in Herbert's Addition to the City of Cleveland, Pawnee County, State of Oklahoma, according to the recorded plat thereof.**
>
> **SUBJECT, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Willie

Beatrice Simmons aka Beatrice Simmons and judicially determining the known heirs of Willie Beatrice Simmons aka Beatrice Simmons.

The Court further finds that Willie Beatrice Simmons became the record owner of the real property involved in this action by virtue of the Order Allowing Final Account and Final Decree, Case No. P-69-2, dated October 15, 1969, filed of record on October 15, 1969, in the District Court, Pawnee County, State of Oklahoma, and recorded on October 15, 1969, in Book 103, Page 1, in the records of the County Clerk of Pawnee County, State of Oklahoma.

The Court further finds that on June 27, 1972, Stanley James Simmons and Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $15,000.00, payable in monthly installments, with interest thereon at the rate of 7.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, Stanley James Simmons and Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated June 27, 1972, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on June 27, 1972, in Book 129, Page 213, in the records of Pawnee County, Oklahoma.

The Court further finds that Stanley James Simmons died on October 3, 1973, in the City of Cleveland, County of Pawnee, State of Oklahoma. Upon the death of Stanley James Simmons, his homestead interest in the subject real property terminated. Certificate of Death No. 20922 issued by the Oklahoma State Department of Health certifies Stanley James Simmons' death.

The Court further finds that on July 25, 1980, Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of $4,500.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated July 25, 1980, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on July 28, 1980, in Book 253, Page 360, in the records of Pawnee County, Oklahoma.

The Court further finds that on December 11, 1980, Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of $3,880.00, payable in monthly installments, with interest thereon at the rate of 12.0 percent per annum.

The Court further finds that as security for the payment of the above-described note, Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated December 11, 1980, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on December 12, 1980, in Book 266, Page 239, in the records of Pawnee County, Oklahoma.

The Court further finds that Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Interest Credit Agreements pursuant to which the interest rate on the above-described notes and mortgages was reduced.

Instrument	Dated	County
Interest Credit Agreement	07/25/80	Pawnee
Interest Credit Agreement	12/11/80	Pawnee
Interest Credit Agreement	01/01/82	Pawnee
Interest Credit Agreement	09/08/83	Pawnee
Interest Credit Agreement	08/14/84	Pawnee
Interest Credit Agreement	10/21/85	Pawnee
Interest Credit Agreement	09/22/86	Pawnee
Interest Credit Agreement	09/30/87	Pawnee
Interest Credit Agreement	09/22/89	Pawnee
Interest Credit Agreement	10/16/90	Pawnee

The Court further finds that on February 11, 1991, Beatrice Simmons executed and delivered to the United States of America, acting through the Farmers Home Administration, two separate Reamortization and/or Deferral Agreements pursuant to which the entire debt due on the two notes and mortgages executed by her on July 25, 1980 and December 11, 1980, on that date was made principal.

The Court further finds that Willie Beatrice Simmons died on January 14, 1994, in the City of Tulsa, County of Tulsa, State of Oklahoma. Upon the death of Willie Beatrice Simmons, the subject property vested in her known heirs by operation of law. Certificate of Death No. 2874 issued by the Oklahoma State Department of Health certifies Willie Beatrice Simmons' death.

The Court further finds that Willie Beatrice Simmons aka Beatrice Simmons, now deceased, made default under the terms of the aforesaid notes, mortgages, reamortization and/or deferral agreements, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes, mortgages, and reamortization and/or deferral agreements, after full credit for all payments made, the principal sum of $16,411.47, plus accrued interest in the amount of $1,711.18 as of November 27, 1992, plus interest accruing thereafter at the rate of $4.2168 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $6,133.34, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Willie Beatrice Simmons aka Beatrice Simmons and judicial determination of the known heirs of Willie Beatrice Simmons aka Beatrice Simmons.

The Court further finds that the Defendants, **County Treasurer, and Board of County Commissioners, Pawnee County, Oklahoma**, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $25.38 which became a lien on the property as of 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **State of Oklahoma ex rel. Oklahoma Tax Commission** and **First National Bank of Cleveland nka First Bank of Cleveland**, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased; Iva Mae Marshall aka Iva Marshall**; and **Paul Cheek, Tenant**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment **in rem** in the principal sum of $16,411.47, plus accrued interest in the amount of $1,711.18 as of November 27, 1992, plus interest accruing thereafter at the rate of $4.2168 per day until judgment, plus interest thereafter at the current legal rate of 7.22 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $6,133.34, plus interest on that sum thereafter at the current legal rate of

_____ percent per annum until paid, plus the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Willie Beatrice Simmons aka Beatrice Simmons be and the same is hereby judicially determined to have occurred on January 14, 1994, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heir of Willie Beatrice Simmons aka Beatrice Simmons Deceased, is Iva Mae Marshall aka Iva Marshall, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Willie Beatrice Simmons aka Beatrice Simmons, Deceased, have been discovered and it is hereby judicially determined that Iva Mae Marshall aka Iva Marshall is the only known heir of Willie Beatrice Simmons aka Beatrice Simmons, Deceased, and that Willie Beatrice Simmons aka Beatrice Simmons, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on November 3, 1994 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, have and recover judgment in the amount

of $25.38 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Willie Beatrice Simmons aka Beatrice Simmons, Deceased; Iva Mae Marshall aka Iva Marshall; Paul Cheek, Tenant; State of Oklahoma ex rel. Oklahoma Tax Commission;** and **First National Bank of Cleveland nka First Bank of Cleveland**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> **First**:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> **Second**:
> In payment of the judgment rendered herein in favor of the Plaintiff;
>
> **Third**:
> In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Pawnee County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-427-E

WDB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY ALBERT HORNER,

Petitioner,

vs.

LARRY MEACHUM,

Respondent.

No. 93-C-443-B

ORDER

Before the Court is Petitioner's notice of appeal filed on December 2, 1994. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus entered on November 4, 1994. The Petitioner is not proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After carefully considering the record in this case, the Court

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concludes that a certificate of probable cause should not issue in this case because the Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause be **denied**. Fed. R. App. P. 22(b).

SO ORDERED THIS 3rd day of Jan., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK A. BOYD TRUST, by Mark A. Boyd, Trustee; CAROLYN J. BOYD TRUST, by Carolyn J. Boyd, Trustee; LARRY BOYD TRUST, by Larry Boyd, Trustee; MATTHEW J. BOYD TRUST, by Matthew J. Boyd, Trustee; D&L INDUSTRIAL SERVICE, INC.; BOYD MACHINE & REPAIR, INC.; LIGHT BEAM TECHNOLOGY, INC. Plaintiffs, vs. ALAN L. ALLEN, ROGER CALES, individually and each dba TRI-STATE ENERGY; TRI-STAR ENERGY; ED STAM, and BEDFORD OIL & GAS, INC., Defendants.	)	FILED DEC 30 1994 Richard M. Lawrence, Clerk U.S. DISTRICT COURT Case No. 94-C-655-B ENTERED ON DOCKET DATE JAN 03 1995

O R D E R

Before the Court for consideration are the following motions: a Motion to Dismiss (Docket #4) filed by Defendant Roger Cales ("Cales"); a Motion to Dismiss (Dockets #8 and #15)[1] filed by Defendant Alan L. Allen ("Allen"); and a Motion to Dismiss, or in the alternative to Transfer (Docket #12) filed by Defendants Ed Stam ("Stam") and Bedford Oil & Gas, Inc. ("Bedford").

The Plaintiffs in this case are citizens of Indiana, and the Defendants are citizens of Texas. The Plaintiffs allege that they purchased securities--consisting of oil and gas leasehold working interests in Texas wells--from the Defendants. The Plaintiffs

[1]Allen apparently filed the same motion twice.

state that, in connection with the sale of these securities, the Defendants intentionally made false statements of material facts regarding the expected rate of return on the investment. The Plaintiffs also allege that the Defendants failed to disclose material information, such as the cost of operating the wells, and the Defendants' experience and background. The Plaintiffs say that they relied on these material misstatements and omissions in deciding to purchase the securities, and that they would not have done so absent the misstatements and omissions.

The Plaintiffs seek rescission of the sale of the securities. They also allege violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, and fraud under the laws of Texas and Indiana. They also seek punitive damages. The Defendants have filed several motions to dismiss, based on various grounds as set out below.

I.

Cales alleges that the Court has no subject matter jurisdiction to hear this case, but provided no basis for this allegation. This claim is without merit, as the Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331, to hear claims based on a violation of a federal statute. Further, Section 27 of the Securities Exchange Act of 1934 confers federal jurisdiction over claims of violations of federal securities law.[2] Securities

[2]As a general rule, when a plaintiff states claims under both the 1933 and 1934 securities acts, as do the Plaintiffs in this case, the less restrictive jurisdiction and venue provisions

Investor Protection Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985).

Fifteen U.S.C. § 78aa states, in pertinent part:

> The district courts of the United States ... shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter....

See also Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255 (5th Cir. 1994). The Court has exclusive subject matter jurisdiction to hear this case, which alleges violation of federal securities law.

II.

Both Cales and Allen allege that the Court has no *in personam* jurisdiction over them because they have no minimum contacts with Oklahoma sufficient to hale them into court here. *See* International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Section 27, however, provides for nationwide service of process.[3] It is not the state of Oklahoma that is exercising jurisdiction over the Defendants, it is the United States. Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974). Therefore, the question

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contained in § 27 of the 1934 Act are to be applied. Hilgeman v. National Insurance Company of America, 547 F.2d 298 (5th Cir. 1977).

[3]Section 27 provides that "[P]rocess ... may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

in this case is not whether the Defendants have sufficient minimum contacts with Oklahoma; instead, the question is whether the Defendants have sufficient minimum contacts with the United States to satisfy due process.[4] When a defendant resides within the territorial boundaries of the United States, the minimum contacts required to justify the federal government's exercise of power over him are present. Id. at 1143; Vigman, 764 F.2d at 1316. Because the Defendants reside within the United States--in this case, in Texas--this Court has personal jurisdiction over them.

Defendants allege that they were tricked into coming to Oklahoma by Boyd in order to obtain service, so this Court should not exercise jurisdiction over them. As stated above, because jurisdiction is based on minimum contacts with the United States, and not with Oklahoma, the Defendants' reason for being here is irrelevant - the Court would have *in personam* jurisdiction regardless of where the Defendants were served.

III.

Cales alleges that the service of process was inadequate pursuant to Fed.R.Civ.P. 4 because it was done by the Plaintiffs' attorney after a meeting in Tulsa, Oklahoma. Rule 4(c)(2) states that service "may be effected by any person who is not a party and

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[4]*See also* Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947 (1st Cir. 1984); FTC v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979); Washington Public Utilities Group v. U.S. District Court, 843 F.2d 319 (9th Cir. 1987); and Piper Acceptance Corp. v. Slaughter, 600 F.Supp. 169 (D.Colo. 1985).

who is at least 18 years of age." Service in this case was not made by a party; rather, it was made by the Plaintiffs' attorney. Based upon the plain language of Rule 4, service of the summons and complaint by an attorney for the plaintiff has been held to be proper service. Trustees of Local Union No. 727 v. Perfect Parking, Inc., 126 F.R.D. 48 (N.D.Ill. 1989). *See also* Jugolinija v. Blue Heaven Mills, 115 F.R.D. 13 (S.D.Ga. 1986).

IV.

Stam and Bedford allege that this action should be dismissed because this Court is not the proper venue for the claim. According to § 27, venue in securities cases may be laid where any act or transaction constituting the violation occurred, or "in the district wherein the defendant is found or is an inhabitant or transacts business." Plaintiffs allege that, because the Defendants were served in Tulsa, they were "found" here for venue purposes as well. The Court agrees. The venue provisions of § 27 "relate back to the jurisdictional portion, and allows such actions to be brought in any district where the defendant is found ...." Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971). While the Defendants allege correctly in their Motion to Dismiss that they do not transact business within Oklahoma, they do not address the fact that they were "found" here. They do not persuade the Court that "found" for the purposes of venue should be

different than "found" for the purposes of personal jurisdiction,[5] as both are contained in § 27 and there is no indication that different definitions were intended.

Venue also is proper as to Defendant Allen, who was served by mail. If venue is proper as to at least one Defendant in a securities action, it is proper as to all Defendants, based on the "co-conspirator" venue theory. Vigman, 764 F.2d at 1317.

V.

Although the Court holds that venue is proper here, the question remains whether the Court should hear the case, or transfer it pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties. Section 1404(a) states

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The purpose of § 1404(a) is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). *See also* ROC, Inc. v. Progress Drillers, Inc., 481 F.Supp. 147 (W.D.Okla. 1979). The burden of establishing the requisite inconvenience is on the movant; the Plaintiff's choice of forum should rarely be disturbed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839,

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[5]See Section II, *supra.*

91 L.Ed. 1055 (1947).

The first question is whether there is another district where this action might have been brought. As stated above, any federal court would have subject matter jurisdiction and personal jurisdiction over the parties. The question is whether another court would have proper venue. Because the Defendants' principal place of business is in the Northern District of Texas, Fort Worth Division, they are an "inhabitant" of that district and they transact business there for the purposes of § 27 venue.

Indiana may be a proper venue as well, because the dealings between Plaintiffs and Defendants that occurred in Indiana could be considered "any act or transaction constituting the violation". Even one act is sufficient, so long as that act is not an immaterial part of the claim. Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960); Goldwater v. Alston & Bird, 664 F.Supp. 403 (S.D.Ill. 1986); Mariash, 496 F.2d at 1143. According to the affidavit of Plaintiff Larry Boyd, the Defendants contacted Plaintiffs in Indiana, the Plaintiffs invested in the oil wells using checks drawn on an Indiana bank, and they signed the subscription agreement in Indiana (¶ 3, 10, Exhibit 1, Plaintiffs' Response to Motion to Dismiss). Boyd's affidavit also details telephone calls made by the Defendants to him in Indiana. Therefore, it appears that Indiana also is a proper venue.

In determining whether to transfer a case under § 1404(a), the Court considers three factors: (1) convenience to the parties; (2) convenience to the witnesses; and (3) the interests of justice.

The first factor to consider is the convenience of the parties. The Plaintiff's choice of forum should rarely be disturbed. However, "this factor has reduced value, where, as in this case, there is an absence of any significant contact by the forum state with the Plaintiff or the transactions or conduct underlying the cause of action." National Surety Corp. v. Robert M. Barton Corp., 484 F.Supp. 222, 224 (W.D.Okla. 1979). *See also* Northwest Animal Hospital, Inc. v. Earnhardt, 452 F.Supp. 191 (W.D.Okla. 1977) ("[T]his factor alone has minimal value where none of the conduct complained of occurred in the forum selected by the Plaintiffs."); Kendall U.S.A. v. Central Printing, 666 F.Supp. 1264 (N.D.Ind. 1987) ("Where, as here, the chosen forum is not the plaintiff's residence, the defendant's place of residence becomes more important in determining the convenience to the parties.")

As the court noted in Waste Distillation Technology v. Pan American Resources, 775 F.Supp. 759 (D.Del. 1991):

> Where a plaintiff chooses to litigate away from its principal place of business, "the quantum of inconvenience to defendant needed to tip the balance strongly in favor of transfer necessarily will be less than in the case where plaintiff's choice of forum is highly convenient to plaintiff."

Id. at 764 [citations omitted]. *See also* Dworkin v. Hustler Magazine, Inc., 647 F.Supp. 1278 (D.Wyo. 1986) (noting with approval the federal caselaw from Oklahoma that the plaintiff's choice of forum should receive less weight when the forum has no connection to the case). Neither the Plaintiffs nor the Defendants live in the Northern District of Oklahoma, nor did any of the transactions that

made up the cause of action occur here. The Plaintiffs' only tie to the Northern District of Oklahoma is that their attorney practices here; this factor, however, is irrelevant to the issue of whether the case should be transferred. Prather v. Raymond Construction Co., 570 F.Supp. 278 (N.D.Ga. 1983); Lee v. Hunt, 410 F.Supp. 329 (M.D.La. 1976) ("[T]he convenience of counsel is not one of the considerations to be accorded weight in connection with a Section 1404 transfer."). Therefore, the Defendants have an easier burden here than in most cases to show that a transfer is warranted, because this forum is not Plaintiffs' home forum.

Of all the listed Plaintiffs, only Larry Boyd had any dealings with the Defendants. He alone handled the investments and transactions that are the subject of this lawsuit. (Affidavit of Larry Boyd, ¶ 1, Exhibit 1, Plaintiffs' Response to Motion to Dismiss). Therefore, only he would have material information as to the misstatements and omissions alleged in the Complaint. In addition, by filing suit in Oklahoma, rather than in his home state of Indiana, Boyd already has demonstrated a willingness to travel in connection with this case. "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." Scheidt v. Klein, 956 F.2d 963 (10th Cir. 1992). Transferring this case to Texas does not significantly add to the inconvenience already experienced by Plaintiffs, and does not force the Plaintiffs away from a convenient forum. "A forum which is inconvenient to both parties is inimical to the plain meaning of 28 U.S.C. § 1404." Rowe v.

Chrysler Corp., 520 F.Supp. 15, 16 (E.D.Mich. 1981). Defendant Stam states, however, that all his witnesses are in Texas, all his documents regarding the cause of action are in Texas, and the oil and gas sites in question are in Texas, all of which point to Texas as the more convenient forum.

The second factor to consider is the convenience of witnesses. This factor is not weighed from the standpoint of greater number of witnesses involved, but from consideration of the nature or materiality of the testimony to be offered by prospective witnesses. National Surety, 484 F.Supp. at 225. As stated above, Boyd apparently is the only Plaintiff who has knowledge of the circumstances surrounding this case, and his testimony obviously is material. On the other hand, Defendant Stam lists two witnesses (his co-defendants) with material knowledge of this lawsuit. (Declaration of Ed Stam, ¶ 8). Stam, however, does not discuss the materiality of the testimony or whether the witnesses would be unwilling to travel to the Northern District of Oklahoma. He does state, however, that it would be burdensome and inconvenient for them to be away from their businesses. (Id. at ¶ 8(a)). "Disruption of business ... is a valid concern when considering transfer." Kendall, 666 F.Supp. at 1268.

The third factor to consider is the interest of justice. "Under this standard, there should be considered the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, and all other practical problems

that make trial of a case easy, expeditious and inexpensive." National Surety, 484 F.Supp. at 226.

No source of proof or witness is located in the Northern District of Oklahoma, and all unwilling witnesses would be outside this Court's subpoena power. In addition, because the cause of action also involves violations of Texas and Indiana state laws, the parties would have the advantage of having a local judge determine matters of local law. Chrysler Credit Corp. v. County Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991). Plaintiffs state that one of the reasons they chose this forum was to have a judge with oil and gas law expertise; the Court believes that the Plaintiffs will find such expertise in a Texas court as well.

Ultimately, the Court finds that Plaintiffs' choice of forum is outweighed by the public interest in assuring that "localized controversies are decided at home." Gulf Oil, 330 U.S. at 508-9. This forum has no connection with the parties or with the cause of action. As the Supreme Court noted in Gulf Oil, "the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Id. While the Court does not believe the Plaintiffs are attempting to "vex" or "harass" the Defendants by choosing this forum, proceeding in this forum causes the Defendants trouble that is unnecessary to Plaintiffs' right to pursue this case.

Therefore, in the interests of justice and for the convenience of the parties and witnesses, this case shall be transferred to the

Northern District of Texas, Fort Worth Division. Accordingly, Defendants' Motion for Change of Venue is hereby GRANTED.

IT IS SO ORDERED THIS 30th DAY OF DECEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PRODUCERS OIL COMPANY Plaintiff, vs. PHOENIX ASSURANCE COMPANY OF NEW YORK, HARTFORD FIRE INSURANCE COMPANY, ALBANY INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, FEDERAL INSURANCE COMPANY, and UNDERWRITERS AT LLOYD'S LONDON, Defendants.	)	No. 93-C-431-B

ORDER OF DISMISSAL

NOW ON this 30 day of Dec, 1994, this matter comes before the Court upon the joint stipulation and motion of Plaintiffs, Producers Oil Company and Charles Goodall Revocable Trust, and Defendant, Albany Insurance Company, for an order for the Court dismissing the Plaintiffs' Complaint in cause herein against Defendant Albany Insurance Company.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the Plaintiffs' cause herein against Albany Insurance Company be dismissed with prejudice;

2. That the Plaintiffs' cause against the other Defendants in the referenced matter shall continue intact; and

3. That Plaintiffs and Defendant Albany Insurance Company shall bear their respective costs and pay their own

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attorney fees in this matter.

~~THE HONORABLE JAMES O. ELLISON~~
~~JUDGE OF THE DISTRICT COURT~~
Thomas R. Brett, U.S. Dist. Judge

TOM R. STEPHENSON, OBA# 8609
120 E. Main, P.O Box 699
Watonga, OK 73772
(405) 623-7400

ENTERED ON DOCKET
DATE 1-3-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY JO McCRARY,

Plaintiff,

vs.

DONNA SHALALA, in her capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-616-K

FILED

JAN 3 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Before the court is the combined Motions of the Defendant to Dismiss and/or For Summary Judgment. Plaintiff Dorothy Jo McCrary ("McCrary") seeks recovery in this action for alleged discrimination, sexual harassment, and retaliatory action, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the Civil Rights Act of 1991.

Plaintiff was hired by the Indian Health Service ("IHS") in February of 1976 to work at the W.W. Hastings Indian Hospital in Tahlequah, Oklahoma. From 1985 until July of 1989, McCrary filed four Equal Employment Opportunity ("EEO") complaints prior to her termination in October of 1989 for excessive absences. These complaints provide the basis for her allegations in this Court.

Plaintiff filed her first EEO claim, IHS-388-85, on June 14, 1985, alleging that she was the subject of sexual harassment on April 11, 1985 when an EEO officer made a lewd comment and gesture. On September 25, 1991, the IHS offered Plaintiff relief, an offer which the Plaintiff rejected. In May of 1992, the IHS extended the

offer once again and certified that the September offer constituted full relief. After the offer was not accepted, the agency dismissed the EEO complaint pursuant to 29 C.F.R. §1614.107(h).

Two later complaints by Plaintiff, IHS-151-88 and IHS-002-92, involve actions taken or conditions in her working environment from 1986 to 1989. She filed IHS-151-88 on January 4, 1988, complaining that: she was forced to work in a hostile environment; management was receiving false reports about her; and her responsibilities were being transferred. She later filed IHS-002-92 on July 30, 1989 alleging that: management asked a co-worker to write a negative report about her; management invaded her privacy by talking to her personal physician; she was forced to furnish medical documentation before a request for advance leave could be decided; and her supervisor denied her a fiscal year 1988 performance review.

When Plaintiff was not interviewed for a promotion to Supervisory Management Analyst, she filed IHS-001-92 on April 18, 1989. This complaint preceded the above-mentioned July complaint regarding management action directed towards her.

After Plaintiff was terminated for excessive absences, she appealed the decision to the Merit Systems Protection Board (MSPB) where she argued that her absences were medically necessary due to health problems caused by sexual harassment and retaliation. She also claimed that the termination came in retaliation for her previous EEO complaints. She requested that she be returned to her position with back pay and payment for medical bills.

Plaintiff and her attorney entered into a Compromise and

Settlement Agreement with the Department of Health and Human Services ("DHS"), of which IHS is a sub-agency, to resolve the appeal. The agreement changed the basis of Plaintiff's removal from "excessive absences from duty" to "medical reasons" and waived the IHS' recovery of 97.50 hours, or $1,192, in advance sick leave. In return, Plaintiff agreed to withdraw her challenge of the termination decision to the MSPB and waived her right to bring any future administrative, judicial or other action to challenge the agency's decision to remove her from the position at W.W. Hastings Indian Hospital. The settlement agreement led to dismissal of Plaintiff's appeal before the MSPB pursuant to MSPB Initial Decision of January 22, 1990. Plaintiff did not avail herself of the opportunity to seek timely judicial review of the decision in the United States Court of Appeal for the Federal Circuit.

On July 6, 1993 Plaintiff filed this civil action and later filed an Amended Complaint on January 27, 1994. In the Complaint, she demanded a jury trial and seeks relief in the form of: back pay and benefits denied her by defendant; an order of the Court protecting her from further retaliatory acts and discrimination; monetary damages for personal pain and suffering and the intentional infliction of pain and distress, attorney fees and costs; and reinstatement to her former position.

Legal Analysis

The Defendant seeks dismissal of any claims for compensatory damages pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a

claim upon which relief can be granted. Defendant states that the complaints based on IHS-388-85 should be denied as a matter of law and that summary judgment should be granted with regard to complaints based on IHS-151-88 and IHS-002-92 that gave rise to her subsequent termination agreement. Finally, Defendant seeks summary judgment denying Plaintiff's claims under IHS-001-92 concerning her application for the supervisory position. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

A. Compensatory Damages and Jury Trial

The United States of America enjoys sovereign immunity from suit except where it consents to be sued. In light of the Supreme Court's recent decision in Landgraf v. USI Film Products, et. al., 114 S.Ct. 1483, 1508 (1994), Plaintiff concedes now that she does not have any right to compensatory damages nor to a jury trial. In

Landgraf, the Court held that §102 of the 1991 Civil Rights Act, which includes provisions creating a right to recover compensatory damages for intentional discrimination violative of Title VII and authorizing a jury trial if such damages are claimed, does not apply retroactively to cases arising before its enactment. Therefore, Plaintiff's initial requests for compensatory damage relief for alleged violations are dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Similarly, Plaintiff's demand for a jury trial is stricken.

B. Offer of Relief on IHS-388-85

With regard to sexual harassment complained of in IHS-388-85, Plaintiff now also concedes that Defendant correctly interprets recent decisions holding that a refusal to accept a certified offer of full relief may serve as grounds for dismissal of a complaint in district court. In making the argument that the IHS offer of relief precluded future suit on the same claim, Defendant relies heavily on Wrenn v. Secretary, Dept. of Veteran Affairs, 918 F.2d 1073 (2nd Cir. 1990), cert. denied, 499 U.S. 977 (1991), and Frye v. Aspin, 997 F.2d 426 (8th Cir. 1993). Those decisions emphasize the duty of good faith participation in the administrative process by plaintiffs wishing to bring civil actions, a duty much related to the concept of exhaustion of administrative remedies. While Plaintiff concedes the correctness of this legal interpretation, Plaintiff points out that the question of full relief is a matter

of fact. Dismissal is only appropriate, Plaintiff argues, where there is no material question of fact on the issue of full relief.

Having made a review of the allegations alleged in IHS-388-85, this court finds that the offer of relief provided in the September 25, 1991 letter to Plaintiff constituted full relief in accord with 29 C.F.R. §1614.501. Full relief includes the following when appropriate:

1. Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

2. Commitment that corrective, curative, or preventative action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

3. An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

4. Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

5. Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

In her allegations of sexual harassment, Plaintiff had alleged that Mr. Don Ade came into her office and made a lewd gesture and did not show respect to her as a female. She also complained of other harassing comments made by Mr. Ade. The certified offer of relief stated that IHS would pay Plaintiff's reasonable attorney's fees and would:

1. Provide a workplace free of sexual harassment;

2. Consider whether conduct of alleged discriminatory official deserves discipline and if so administer it;

3. Issue appropriate policy statements to all employees, explaining employees' rights to be free of sexual harassment;

4. Ensure that the Service Unit at which the case arose would issue policy documents explaining management's responsibilities to promptly handle any claims of sexual harassment and provide more specific guidance on the subject to Service Unit employees;

5. Ensure that the Oklahoma City Area of the Indian Health Service will train all supervisors and managers in EEO principles, stressing the area of sexual harassment. At least one training session will take place in the Service Unit where this complaint arose.

In light of the fact that Plaintiff suffered no loss of pay or position as a result of the sexual harassment alleged in IHS-388-85 and that Plaintiff is ineligible to win compensatory damages, the offer constituted full relief for Plaintiff. Moreover, the agency could not have issued an injunction against further discrimination directed against Plaintiff, since Plaintiff no longer worked at the agency. Therefore, the action was appropriately dismissed by the agency and no recourse to this Court presently exists on the facts alleged in IHS-388-85.

C. Compromise and Settlement Agreement Regarding Termination

Plaintiff also challenges her termination from employment with IHS on October 6, 1989, charging that she was terminated in retaliation for the grievances she filed. The allegations of Plaintiff within IHS-151-88 and IHS-002-92 complain of conditions or actions taken within her working environment in 1986 through 1989 that relate to her eventual termination on October 6, 1989.

Plaintiff chose to appeal her termination before the MSPB pursuant to 5 C.F.R. §1201.151. That pursuit ended when McCrary and her attorney signed a settlement agreement with Kermit P. Williams, Assistant Regional Counsel for DHS. The Compromise and Settlement Agreement ("Agreement") in MSPB Docket No. DA07529010051 unequivocally states: "5. Dorothy J. McCrary waives her right to bring any future administrative, judicial, or other action to challenge the agency's decision to remove her from her position at W.W. Hastings Indian Hospital." Although the Compromise and Settlement Agreement does not waive any claims unrelated to her termination, it does constitute waiver of the retaliatory termination claims filed in this suit and of the matters included in EEO Complaints IHS-151-88 and IHS-002-92 implicating the agency's decision to terminate her.

It is well settled that a plaintiff "may waive his cause of action under Title VII as part of a voluntary settlement." Glass v. Rock Island Refining Corp., 788 F.2d 450, 454 (7th Cir. 1986) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974)). Title VII discrimination claims may be waived, but the waiver must be knowing and voluntary. Torrez v. Public Service Company of New Mexico, 908 F.2d 687, 689. Waivers of federal remedial rights are not lightly to be inferred. Watkins v. Scott Paper, 530 F.2d 1159, 1172 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976).

While the terms of the contract are important, the Tenth Circuit looks beyond the specific contract language and applies a totality of the circumstance test to assess a plaintiff's knowledge

and the voluntariness of the waiver. Torrez, 908 F.2d at 689. In so doing, the courts have considered the following circumstances under which the release was signed: 1) clarity and specificity of the release language; 2) plaintiff's education and business experience; 3) amount of time plaintiff had for deliberation about the release before signing it; 4) whether plaintiff knew or should have known about her rights upon execution of the release; 5) whether plaintiff was encouraged to seek or received the benefit of counsel; 6) whether there was an opportunity to negotiate the terms; 7) whether consideration given in exchange for waiver exceeded and accepted by employee exceeds benefits to which employee was entitled by contract or law. Id. at 689-690.

The Agreement at issue here was simple and explicit, consisting only of six substantive provisions, one of which was the waiver of "future administrative, judicial, or other action to challenge the agency's decision to remove her." In return for the waiver, the Agreement changed the stated basis of Plaintiff's removal from "excessive absences" to "medical reasons" and waived the IHS's recovery of $1,192 in advance sick leave. Moreover, Plaintiff was represented by the same counsel, Nathan Young, when Plaintiff filed the initial appeal in October of 1989 and in negotiating the Agreement in January of 1990. Mr. Young also signed the agreement. Plaintiff asserts in her Response to Defendant's Motion for Summary Judgment that she was told by Mr. Williams, attorney for the DHS, that the signing of the agreement would not preclude future EEOC claims. Pl.'s Resp., Ex. A. Thus,

her challenge is based on a charge that she was misled as to the meaning of the Agreement into believing she could still sue for wrongful termination. However, the language of the Agreement clearly and explicitly precluded subsequent suit. Furthermore, Plaintiff had benefit of counsel throughout the process, and the experience of thirteen years with the agency. Plaintiff's mere assertions, as articulated in her affidavit, are not sufficient to prevent summary judgment against her. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1418 (10th Cir. 1993). In view of these facts, this court concludes that Plaintiff knowingly and voluntarily waived further claims based on her termination. Therefore, summary judgment is granted with respect to claims based on Plaintiff's complaints involving her removal from the IHS.

D. Failure to be Interviewed for Supervisor's Position

Defendant asserts that it is entitled to summary judgment pursuant to Fed.R.Civ.P. 56 on the decision by IHS not to interview Plaintiff for the Supervisory Management Analyst Position under vacancy announcement No. OC-89-69. Plaintiff filed an EEO complaint, IHS-001-92, on April 18, 1989, alleging that she was not interviewed for this position in retaliation for filing EEO complaints.

In order to defeat the summary judgment motion, Plaintiff points to a comment made by Franklin Dreadfulwater, Associate Director of the Oklahoma City Area IHS, about Plaintiff. According to a co-worker of Plaintiff, Dreadfulwater stated in response to a

comment by the co-worker about Plaintiff's EEO complaints, "Don't worry about that. There is ways of getting rid of people like that." Pl.'s Resp., Ex. B., Statement of Bernice Willsey.

To establish a prima facie case of retaliation, a plaintiff must show: 1) protected opposition to Title VII discrimination; 2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and 3) a causal connection between such activity and the employer's action. Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993), cert. denied, 114 S.Ct. 1075 (1994). Clearly, the Plaintiff has met the requirements of the first two prongs of the prima facie analysis. The causal connection presents the most troubling question.

Plaintiff shows no clear causal connection between the protected opposition to alleged discrimination and the employer's decision not to interview her for the supervisor's position. The only evidence presented is the remark attributed to Franklin Dreadfulwater. However, it is impossible to discern from the papers heretofore submitted to the Court whether Dreadfulwater was involved in the decision not to interview Plaintiff for the supervisory position. Case law has consistently held that remarks unrelated to the decision making process are insufficient to establish discriminatory intent. In Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), Justice O'Connor examined this issue in her concurring opinion. She stated:

> Stray remarks in the work place . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decision makers or statements

> by decision makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard.

Id. at 277. A co-worker of Plaintiff initiated the discussion at issue by saying that she had nothing to do with Plaintiff's complaints. The co-worker certainly played no role in the decision making process. While Plaintiff has not stated that Dreadfulwater was active in the decision making process, his high-level position raises an inference, although not squarely addressed in the pleadings or briefs, that he may well have been involved in preventing Plaintiff from being interviewed for the Supervisory Management Analyst Position.

In light of this ambiguity, the Court defers a summary judgment decision until further briefing on this question can be evaluated. If Plaintiff is unable to demonstrate that Dreadfulwater assisted in the decision not to interview Plaintiff, then summary judgment would be appropriate. Therefore, both parties are hereby given thirty days in which to file with the Court a supplemental brief with regard to the remarks of Dreadfulwater. Therefore, this Court holds the motion for summary judgment, to the extent it involves the supervisor's position, in abeyance for thirty days. During this time, the parties may submit additional information that the Court will evaluate before making a final decision on this question.

E. Conclusion

In light of the offer of full relief, the harassment claim

pursuant to IHS-388-85 is dismissed. The Court grants summary judgment with regard to complaints involving Plaintiff's termination due to the settlement agreement that contained Plaintiff's waiver of additional claims. Finally, the Court defers any ruling on summary judgment on the claim that Plaintiff was denied the opportunity to interview for the supervisor's position and hereby grants thirty days for additional briefing on this question.

IT IS SO ORDERED THIS 30 DAY OF December 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICIA DALE WILSON,

Plaintiff,

vs.

DONNA E. SHALALA, Secretary of Health and Human Services,

Defendant.

No. 93-C-1082-K

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 7, 1994 in which the Magistrate Judge recommended that the case be remanded.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is the Order of the Court that the above-styled case is hereby remanded to the Secretary for further proceedings not inconsistent with the Report and Recommendation of the United States Magistrate Judge.

ORDERED this 30 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD D. RIDER aka RONALD DEAN RIDER; KATHY J. RIDER; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; MARK REED; MID-CENTURY INSURANCE COMPANY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

DEC 30 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 612B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day of Dec, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** appears by Kim D. Ashley, Assistant General Counsel; the Defendants, **Mark Reed and Mid-Century Insurance Company,** appear not having previously filed their Disclaimer; and the Defendants, **Ronald D. Rider aka Ronald Dean Rider and Kathy J. Rider**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **State of Oklahoma ex rel**

ENTERED ON DOCKET
DATE 1-3-95

Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint via certified mail on June 16, 1994; and the Defendant, **Mid-Century Insurance Company,** waived service of Summons on June 16, 1994.

The Court further finds that the Defendants, **Ronald D. Rider aka Ronald Dean Rider and Kathy J. Rider**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 26, 1994, and continuing through October 31, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Ronald D. Rider and Ronald Dean Rider and Kathy J. Rider**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Ronald D. Rider aka Ronald Dean Rider and Kathy J. Rider**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff,

United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 26, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on July 8, 1994; that the Defendants, **Mark Reed and Mid-Century Insurance Company,** filed their Disclaimer on July 6, 1994; and that the Defendants, **Ronald D. Rider aka Ronald Dean Rider and Kathy J. Rider**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, Ronald D. Rider aka Ronald Dean Rider will hereinafter be referred to as ("Ronald D. Rider"); and that the Defendants, Ronald D. Rider and Kathy J. Rider are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Six (6), WISTFUL VIEW ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on April 15, 1987, the Defendant, Ronald D. Rider, executed and delivered to First Security Mortgage Company his mortgage note in the amount of $49,460.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Ronald D. Rider and Kathy J. Rider, executed and delivered to First Security Mortgage Company a mortgage dated April 15, 1987, covering the above-described property. Said mortgage was recorded on April 24, 1987, in Book 5018, Page 1798, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 18, 1988, First Security Mortgage company assigned the above-described mortgage note and mortgage to Bank of Oklahoma, N.A.. This Assignment of Mortgage was recorded on August 8, 1988, in Book 5120, Page 436, in the records of Tulsa County, Oklahoma; and a corrected assignment, dated September 22, 1988, was recorded on September 26, 1988, in Book 5130, Page 1261, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 14, 1988, Bank of Oklahoma, N.A. assigned the above-described mortgage note and mortgage to U.S. Department of Housing and Urban Development. This Assignment of Mortgage was recorded on August 8, 1988, in Book 5120, Page 437, in the records of Tulsa County, Oklahoma; and a corrected assignment, dated September 23, 1988, was recorded on September 26, 1988, in Book 5130, Page 1259, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1988, the Defendants, Ronald D. Rider and Kathy J. Rider, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1989 and June 1, 1991.

The Court further finds that the Defendants, Ronald D. Rider and Kathy J. Rider, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Ronald D. Rider and Kathy J. Rider**, are indebted to the Plaintiff in the principal sum of $76,061.49, plus interest at the rate of 8.5 percent per annum from May 19, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $7.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of $7.00 which became a lien as of June 25, 1993; and a lien in the amount of $11.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** has a lien on the property which is the subject matter of this action by virtue of a tax warrant filed on May 7, 1991 in the records of Tulsa County, Oklahoma, in the amount of $207.59, plus interest, penalties, and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Ronald D. Rider and Kathy J. Rider**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Mark Reed and Mid-Century Insurance Company**, disclaim any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Ronald D. Rider and Kathy J. Rider**, in the principal sum of $76,061.49, plus interest at the rate of 8.5 percent per annum from May 19, 1994 until judgment, plus interest thereafter at the current legal rate of 7.22 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $25.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $207.59, plus penalties and interest, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Ronald D. Rider, Kathy J. Rider, Mark Reed, Mid-Century Insurance Company and Board of County Commissioners,**

Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Ronald D. Rider and Kathy J. Rider**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $207.59, plus accrued and accruing interest for state taxes currently due and owing.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of

$25.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 612B

NBK:lg